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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

MARATHON OIL COMPANY, A CORPORATION,
Petitioner,

v.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CRAIG VAN METER
JOHN H. ARMSTRONG
1807 Broadway Ave.
Mattoon, Illinois 61938

JOSEPH F. DIVER
Marathon Oil Company Bldg.
539 South Main Street
Findlay, Ohio 45840
Attorneys for Petitioner

CLAYTON L. ORN
RILEY B. FELL
of Counsel

McCORMICK & HENDERSON, INC., CHICAGO

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No.

MARATHON OIL COMPANY, A CORPORATION,
Petitioner,

v.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Marathon Oil Company (Marathon), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit which reversed a judgment of the United States District Court for the Eastern District of Illinois granting petitioner (plaintiff) the relief it sought.

OPINION BELOW.

The opinion of the court of appeals (App. 1)[1] is reported at 358 F.2d 34.

JURISDICTION.

The judgment of the court of appeals was entered on March 3, 1966 (App. 1). A timely application for rehearing was denied on March 31, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the court of appeals failed to follow Illinois law when it held that a railroad company had acquired by condemnation proceedings conducted in 1853 under an 1852 Illinois statute, not only an easement in the lands condemned for a right of way, but also the oil and gas deposits under the lands.

2. Whether the court of appeals failed to follow Illinois law when it held that the contiguous landowners did not mature under the Illinois statute of limitations title by adverse possession to a strip of land included in the right of way condemned by the railroad, but situated outside of its right of way fence, after the district court had found that the contiguous owners had claimed, used and occupied adversely the excluded strip for the statutory period.

STATUTES INVOLVED.

An Illinois statute styled "An Act to Amend the Law Condemning Right of Way for Purposes of Internal Im-

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[1] "App." refers to the appendix to this petition. "App. — C.A." refers to the Appendix filed in the court of appeals by respondents (defendants-appellants). "Supp. App. — C.A." refers to the Supplemental Appendix filed in the court of appeals by petitioner (plaintiff-appellee).

provement'' in force June 22, 1852[2] (Act of 1852). (App. 29-34).[3]

Section 1 of an Illinois statute styled ''An Act in regard to limitations'' approved April 4, 1872, Laws 1871-1872, p. 556, Illinois Revised Statutes (1961) Ch. 83 ''Limitations'', § 1. (App. 35).

STATEMENT.

This action was brought by petitioner to enjoin respondents from drilling a well on, and producing oil and gas from, a railroad right of way. Diversity jurisdiction of the district court was invoked because plaintiff was a citizen of Ohio, defendant Gail Heath (Heath) a citizen of Illinois and defendant The Baltimore & Ohio Railroad Company (B & O Rd.) a citizen of Maryland. Petitioner is the owner of the oil and gas leasehold estates on the lands contiguous to the right of way in dispute and its leases cover the oil and gas deposits under the right of way if the Ohio and Mississippi Railroad Company (O & M Rd.) predecessor of B & O Rd. did not acquire title to the mineral deposits when it condemned the right of way for the purpose of laying its tracks.

The O & M Rd. acquired the right of way in controversy by two condemnation proceedings instituted in 1853 in an Illinois state court (Supp. App. — C.A. 16-27, 28-37). By the Act of 1851, its legislative charter, the railroad was given the right to condemn land for railroad purposes

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[2] §§ 7-24 inc., ch. 92 "Right of Way", Gross Statutes of Illinois 1818-1869, 3d ed.

[3] Two other Illinois statutes were alluded to in the opinion of the court of appeals (a) "An act to incorporate the Ohio and Mississippi Railroad and for other purposes" in force Feb. 12, 1851 (Act of 1851) (App. 36-39); (b) "An Act to Provide For a General System of Railroad Incorporations" approved November 5, 1849 (Act of 1849) (App. 40-45)—officially published as §§ 39-84 inc., ch. 86a "Railroads", Gross Statutes of Illinois 1818-1869, 3d ed.

(App. 38). The 1853 condemnation proceedings were instituted and conducted under the Act of 1852. The court of appeals so correctly held (App. 3-4, 4 fn. 4); however, it construed that Act differently from the way the Act was construed by the district court, and in so doing the court of appeals departed from the law of Illinois. *Infra* 6-16.

The O & M Rd., after having condemned the lands, fenced its right of way, and for more than 60 years it has excluded from its enclosures a part of the condemned lands. These excluded lands have been claimed and used by the owners of the contiguous lands for the statutory period of limitation and leased to petitioner.

By its findings of fact, conclusions of law and decree,[4] the district court construed the 1853 condemnation proceedings—which it held were conducted under the Act of 1852—as vesting in the railroad an easement in the lands taken for a right of way, but not as vesting in it the right to take and appropriate the underlying oil and gas deposits. It found and concluded that title to these deposits remained in the persons who owned the lands at the time of the condemnations, and that their title had vested, by mesne conveyances, in plaintiff and its lessors (App. 16, 18, 22, 24-25, 27).

The district court also found and concluded that the railroad had abandoned a portion of the condemned right of way, and that plaintiff's predecessors in title who owned the contiguous land and plaintiff, who owned the oil and gas leasehold estates on such lands, had matured title by adverse possession to the abandoned portion situated outside the fence erected by the railroad (App. 13-14, 18, 27).

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[4] Printed in the Appendix 9, 17, 24. The district court did not write an opinion, but following the hearing and before rendition of a decision, it ordered both sides to submit briefs and proposed findings of fact, conclusions of law and decree, which was done.

The decree enjoined the defendants from drilling for oil and gas on the right of way and ordered them to abandon and plug a well they drilled after plaintiff had instituted this action (App. 27-28).

The findings and decree of the district court were reversed by the court of appeals.

REASONS FOR GRANTING THE WRIT

I.

The Question Is Important.

Important to the jurisprudence of Illinois is a uniform construction by state and federal courts of its eminent domain statutes on which rests the title to thousands of acres of its lands. Chaos will surely follow if the quantum of the estate acquired in ancient eminent domain proceedings under old statutes of Illinois depends on whether the case is tried in a state or a federal court. It can truly be said that the impact of the decision below is not limited to the parties and the particular lands involved in this action, for railroad tracks, highways, roads, streets and drainage canals cross many large oil fields and coal mines over easements acquired in condemnation proceedings instituted decades ago under the 1852 Act or other similar Acts.

Even under primary methods of operation, where oil and gas are produced by means of natural energy in the reservoir, parties in control of strips and small tracts of land can and do prevent the orderly and economic development of oil and gas resources. The obstacles created by long narrow strips and small tracts of land are multiplied in secondary recovery operations which necessitate the injection of water, gas, fire or other substances into the reservoir to create artificial energy for removing the oil and

gas.[5] In Illinois the economic well-being of the oil industry, with corresponding benefit to thousands of private landowners, depends quite heavily upon secondary recovery operations. The havoc will be unjustifiably compounded by the precedent established by a federal court decision not in accord with Illinois law, as will be the situation if the decision of the court of appeals is allowed to stand.

The decision below is in conflict with well established rules of law in Illinois concerning the strict construction of eminent domain powers, the necessity of an express legislative grant of the power to take a fee, the limitation on the estate taken to that only necessary to accomplish the public purpose to be served and with Illinois decisions denying the right to condemn a fee under specific condemnation statutes containing no broader grant of power than that contained in the Act of 1852.[6]

II.

The Decision Is Wrong.

1. A railroad possessing the power of eminent domain could take under Section 1 of the Act of 1852 property for either of two purposes, namely, (1) "if the right of way

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[5] This is exactly what happened here. Petitioner has owned oil and gas leases contiguous to the railroad right of way which are dated as far back as 1906 and has produced oil and gas from some of those lands for a period of about 60 years. During all that time no effort was made to drill a well on the right of way and produce oil from it. It was only when petitioner started a water flooding program in the area that defendants drilled on the right of way.

[6] The court below departed, without justification, from its own rule, as well as that in other courts of appeals, that a district court's considered view as to the law of the state in which it sits is entitled to great weight and will be accepted on review unless shown to be clearly wrong. *Wisconsin Screw Co.* v. *Fireman's Fund Insurance Co.*, 297 F.2d 697, 701 (7th Cir. 1962); *Shackleton* v. *Food Machinery and Chemical Corp.*, 279 F.2d 919, 922 (7th Cir. 1960).

only is desired'' and (2) if the property ''is required for all or any of the other purposes herein specified.'' (App. 29). The property to be taken is subsequently referred to in other sections of the Act as ''right of way over or across lands'' or the ''right of way over or upon each lot of land.'' (App. 30, 32). Involved here is the construction of the Act only insofar as it authorized a taking for right of way. Of great significance is the failure of the Act to authorize the taking of a fee title to lands or the underlying minerals for right of way purposes.

In the petitions,[7] reports of commissioners and otherwise throughout the 1853 condemnation proceedings the purpose of the taking is repeatedly referred to as a ''right of way'', a ''roadway'', a ''roadbed'', or as being necessary for the ''track'' of the railroad (Supp. App. — C.A. 19, 24, 25, 30, 35, 38).

The quantum of the estate which passes under Illinois law when these words are used was clearly announced in *Tallman* v. *Eastern Illinois & Peoria R. R.*, 379 Ill. 441, 446-447, 41 N.E.2d 537, 540 (1942), where the Supreme Court of Illinois in holding that only an easement passed said, ''The words 'right of way' denote a tenure by which land is held. They are descriptive of the easement right and not the land to which it is affixed''. Also in *Kurz* v. *Blume*, 407 Ill. 383, 385, 95 N.E.2d 338, 339 (1950), the Illinois Supreme Court, citing the *Tallman* case, *supra*, forcefully expressed the law when it said, ''It is settled

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[7] The court of appeals afforded some significance to the fact the petitions requested that upon payment ''the owners . . . may be required to make and deliver . . . a conveyance or release in fee'' to the O & M Rd. (App. 4), but the owners never made and delivered such a conveyance and could not do so because they were minors. Moreover, even though they had not been minors, they could not have been required to convey a fee under the language of the 1852 Act. *Infra* 15 fn. 13.

that a right of way is an easement (citation). . . ." The *Tallman* decision has been recognized as the established law of Illinois by this Court in *Carter Oil Co.* v. *Welker,* 317 U.S. 592 (1942),[8] and even by the court below in *Hicks* v. *Thomson,* 127 F.2d 1001 (7th Cir. 1942), cert. den. 317 U.S. 659 (1942), reh. den. 317 U.S. 708 (1942). Other Illinois cases following the same rule are *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516, 520-521, 30 N.E.2d 24, 26-27 (1940); *Texas Co.* v. *O'Meara,* 377 Ill. 144, 150-152, 36 N.E.2d 256, 258-259 (1941); *Carter Oil Co.* v. *Myers,* 105 F.2d 259, 261 (7th Cir. 1939).

Moreover, under Illinois law an easement would have sufficed for the purposes of the taking under the 1853 condemnation proceedings; consequently no greater estate could have been taken. *Tacoma Safety Deposit Co.* v. *City of Chicago,* 247 Ill. 192, 198-199, 93 N.E. 153, 156 (1910); *Miller* v. *Commissioners of Lincoln Park,* 278 Ill. 400, 406, 116 N.E. 178, 181 (1917). If the decision below is allowed to stand, a railroad will be permitted to take by condemnation for its private use oil and gas deposits under its right of way even though the deposits are not essential to the purposes for which the land is taken and will not be put to a public use. Such a result is contrary to Illinois

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[8] The history of this case has significance for the case at bar. The district court construed a deed as conveying to a railroad a fee simple title to lands acquired for right of way purposes. *Carter Oil Co.* v. *Welker,* 24 F. Supp. 753 (E.D. Ill. 1938). The court of appeals affirmed that judgment. *Carter Oil Co.* v. *Welker,* 112 F.2d 299 (7th Cir. 1940). This court granted certiorari, *Carter Oil Co.* v. *Welker,* 311 U.S. 633 (1940), and on the authority of *Tallman* v. *Eastern Illinois and Peoria R.R.,* 379 Ill. 441, 41 N.E.2d 537 (1942), reversed the judgment of the court of appeals. *Carter Oil Co.* v. *Welker,* 317 U.S. 592 (1942). So again here, as in the *Welker* case the exercise of this Court's power of supervision is necessary to correct the erroneous decision of the court below. The importance of doing so is also illustrated by the *Welker* case.

law as succinctly announced in *Sears* v. *City of Chicago*, 247 Ill. 204, 216-217, 93 N.E. 158, 161 (1910), as follows: "A law could not be sanctioned which would permit a corporation to condemn private property for the sole purpose of applying such property to a purely private use."

The reports of the appraisers in the two 1853 condemnation proceedings (Supp. App. — C.A. 23-26, 34-35) show that the compensation awarded the landowners was for the right the railroad had acquired to build its tracks across their lands. No award was made for the lands, and certainly no award was made for the minerals under the right of way. In this regard, Mr. Justice Holmes in *Pennsylvania Coal Company* v. *Mahon*, 260 U.S. 393, 415 (1922), said, "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for."

2. Under Illinois law not even a city acquires an estate in lands greater than an easement where the city condemns the land for street purposes under statutes containing a broader grant of the power of eminent domain than that contained in the Act of 1852. Although the City of Chicago had authority under a statute—its legislative charter of February 14, 1851[9]—to "appropriate and take lands", nevertheless the Supreme Court of Illinois held it acquired only an easement in lands taken for street purposes under its broad charter powers. *Tacoma Safety Deposit Co.* v. *City of Chicago*, 247 Ill. 192, 93 N.E. 153 (1910); *Illinois Trust & Savings Bank* v. *City of Chicago*, 247 Ill. 264, 93 N.E. 167 (1910). In the *Tacoma* case the court said, "This property was condemned in 1851 *and at that time there*

[9] "An Act to reduce the law incorporating the City of Chicago and the several Acts amendatory thereof, into one Act, and to amend the same" in force February 14, 1851, Private Laws of Illinois 1851, p. 132.

was no statute in force in this state expressly authorizing a city to take the fee of real estate for street purposes. . . ." 247 Ill. at 197, 93 N.E. at 155. (Emphasis supplied.) Nor did the Act of 1852, which the court below held was the act under which the O & M Rd. condemned the lands in dispute, authorize a railroad "to take the fee of real estate for [trackage] purposes."

Under the Illinois Cities and Villages Act,[10] municipalities were granted the right to take "private property . . . for public use," but it was again held by the Supreme Court of Illinois that a city condemning lands for street purposes under the Act acquired only an easement. *Sears* v. *City of Chicago,* 247 Ill. 204, 93 N.E. 158 (1910); *Illinois Central R.R.* v. *City of Chicago,* 138 Ill. 453, 28 N.E. 740 (1891).

Certainly the Act of 1852 did not authorize the O & M Rd. to condemn any greater estate for right of way purposes than did the City of Chicago legislative charter of February 14, 1851, construed in the *Tacoma* and *Illinois Trust* cases, *supra,* or the Cities and Villages Act of July 1, 1872,[11] construed in the *Sears* and *Illinois Central* cases, *supra.* For this reason the court below should have followed the Illinois law as announced in those cases.

3. The district court followed the Illinois law when it construed the Act of 1852 strictly, and so should the court

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[10] "An Act to provide for the incorporation of cities and villages," in force July 1, 1872, Public Laws of Illinois, 1871-1872, p. 218.

[11] The fact that these are the statutes which are respectively construed in the cases cited partially appears from the opinions but that was further confirmed by a personal inspection by counsel of the records on appeal for those cases which are still on file in the office of the Clerk of the Illinois Supreme Court.

of appeals. Under Illinois law the taking of property by exercising the right of eminent domain is in derogation of private rights, and statutes and condemnation proceedings under which lands are taken must be construed strictly. A fee simple title cannot be taken by condemnation except under a legislative grant of power which is either express or arises by necessary implication from the language of the legislative grant. *Tacoma Safety Deposit Co.* v. *City of Chicago,* 247 Ill. 192, 198, 93 N.E. 153, 155-156 (1910); *Illinois Central R.R.* v. *City of Chicago,* 138 Ill. 453, 458, 28 N.E. 740, 741 (1891); *Superior Oil Co.* v. *Harsh,* 39 F. Supp. 467, 471 (E.D. Ill. 1941); *Illinois State Trust Co.* v. *St. Louis I. M. & S. Ry.,* 208 Ill. 419, 422-423, 70 N.E. 357, 358 (1904). The Act of 1852 neither expressly nor impliedly granted railroads the right to take by condemnation the mineral deposits under lands condemned for trackage purposes.

4. The court of appeals cited and quoted from two cases in which it said the Supreme Court of Illinois had "considered" the 1852 Act (App. 5-6). These two cases were the only authorities cited for its construction of the Act. Neither case is applicable.

In the first, *Bartlow* v. *C. B. & Q. R.R.,* 243 Ill. 332, 90 N.E. 721 (1909), the railroad, relying upon condemnation proceedings previously conducted under the Act of 1852, asserted in a partition suit title to a strip of land upon which its tracks had been laid. The decision was that the railroad had no title whatever to the strip because in the condemnation proceedings none of the money awarded by the appraisers had been paid to the five minor children who were the remaindermen, but all of it was paid to their

mother, a life tenant, who in the meantime had died. In the portion of the opinion quoted by the court below (App. 5) the terms "entire property", all the title to the property", and "including the fee simple and all lesser estates" were used to designate whatever the property interest may have been which was sought to be condemned, whether a fee, an easement, a license or any kind of an estate recognized by law. Consequently, all that the Supreme Court of Illinois said or intended to say was that whatever may have been the property interest which was sought to be condemned, the proceedings were directed at the interests of all the property owners, and the compensation was awarded for, but not paid to, all of them. It never reached for decision the question of the nature of the title or quantum of interest acquired for a right of way by condemnation under the Act of 1852.

In the other case, *Keen* v. *C. C. & St. L. Ry.*, 392 Ill. 362, 64 N.E.2d 499 (1945), there was before the Supreme Court of Illinois for construction a voluntary deed, and not the Act of 1852 or any other statute. The quotation by the court below (App. 5-6) from that case contained a reference to the Act of 1852 but the quoted language was expressed by the Supreme Court of Illinois in connection with the issue of the corporate power of the railroad to hold fee title to real estate. As a corollary to the holding that the deed conveyed a fee, it merely stated that the Act of 1852 and the legislative charter of the railroad gave the railroad the corporate power to acquire and hold the fee simple title to land for some purposes. The quotation in the opinion of the court below from the *Keen* case (App. 5-6) very clearly misstates the decision in the *Bartlow* case, *supra*. It is significant too that in the *Keen* case, the Illinois Supreme Court distinguishes that case from *Tallman* v. *Eastern Illinois & Peoria R.R.*, 379 Ill. 441, 41 N.E.

2d 537 (1942), *supra* 7-8, and recognizes the *Tallman* decision as still being the law of Illinois.

The *Bartlow* and *Keen* cases, *supra,* do not hold that a railroad took fee simple title to lands acquired for a right of way by condemnation under the Act of 1852. In neither case was there before the Illinois Supreme Court the issue as to the quantum of estate—that is fee or easement—acquired by a railroad for trackage purposes under the 1852 Act. Therefore the quotations by the court below from these cases (App. 5-6) are obiter dicta and not controlling authority for the case at bar. *Webster* v. *Fall,* 266 U.S. 507, 511 (1925); *Armour & Co.* v. *Wontock,* 323 U.S. 126, 132-133 (1944); *Village of Lombard* v. *Illinois Bell Telephone Co.,* 405 Ill. 209, 219, 90 N.E.2d 105, 111 (1950); *Shackleton* v. *Food Machinery and Chemical Corp.,* 279 F.2d 919, 922 (7th Cir. 1960).

5. The court below should not have afforded significance to the Act of 1849 in construing the nature of the title acquired by the O & M Rd. in the 1853 condemnation proceedings (App. 3) after it had correctly concluded that the proceedings were not prosecuted under the 1849 Act but under the Act of 1852 (App. 3-4, 4 fn. 4). Having held that the 1852 Act was controlling, it was immaterial as to the kind of an estate which could have been taken under the Act of 1849. The O & M Rd. having elected to conduct the 1853 proceedings under the Act of 1852, the rights of the parties and the title acquired are governed by the 1852 Act.[12] *Peoria, Pekin & Jacksonville R.R.* v.

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[12] The fact that the charter of a company gives it the specific right to condemn under one statute does not restrict it to that statute and it may instead proceed under the law governing eminent domain in effect at the time of the proceedings. *East St. L. & C. Ry. Co.* v. *Belleville City Ry. Co.,* 159 Ill. 544, 548-550, 42 N.E. 974, 975-976 (1896).

Black, 58 Ill. 33 (1871); *Peoria, Pekin & Jacksonville R.R.* v. *Laurie*, 63 Ill. 264 (1872). On this proposition where this very Act of 1852 and an alternative statute were involved, it was said in the *Laurie* case: "* * * We think from the character of the proceedings as instituted, and the direct reference made to the Act of 1852, that the company must be governed by that Act, and that the rights of the parties must be controlled by it." 63 Ill. at 266.

Moreover in assigning importance to language found in the 1849 Act but omitted from the 1852 Act, the court below took action which is just the reverse of that dictated by a cardinal rule of statutory construction. While it did not analyze in its opinion the 1849 Act nor refer to any of its provisions, nevertheless it obviously was swayed by the provisions of Section 22 of the 1849 Act. This section after calling for the filing of the commissioner's report (App. 44) and for the entry of a "rule" relative to the award (App. 44), provides:

> "Upon the entry of such rule the said Corporation shall become seized in fee of all the lands and real estate described in said rule as required to be taken as aforesaid—during the continuance of the Corporation by this or any subsequent act and may take possession of and hold and use the same for the purposes of said Road . . . ." (App. 44)

The court below must have had this section in mind when it said the Act of 1849 contemplated the taking of a fee by a railroad for use in the construction of its tracks (App. 3). We respectfully submit that it was wrong in its construction of the 1849 Act,[13] but assuming arguendo it

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[13] The language above quoted from Section 22 of the Act of 1849 would allow the railroad to be seized of the lands only "during the continuance of the corporation" or so long as the lands were used "for the purposes of said Road". That does not constitute a fee simple and certainly does not include the oil and gas. See *Smith*

was right, nevertheless the 1849 Act is of no consequence in the case at bar because the Act of 1852 omitted the provisions found in Section 22 of the 1849 Act referred to and partially quoted above. The omission is significant. It demonstrates that even if the Illinois legislature did intend to confer on a railroad power to condemn a fee for trackage under the 1849 Act, such was not its intention when it omitted from the 1852 Act the language in the 1849 Act which conferred that power. Where two alternative statutes exist relating to the same subject matter which were passed at different times and provisions are omitted from the last statute which appeared in the first one, the court, in construing the last enactment, will presume that the legislature intended to wrought a change in the purposes of the statutes. Consequently when the Illinois legislature did not carry into the Act of 1852 language it employed in the Act of 1849, it has to be presumed that since both Acts cover the same subject matter a change in the law was intended. *Maneja* v. *Waialua Agriculture Company*, 349 U.S. 254, 268 (1955); *Village of Atwood* v. *Cincinnati, I. & W. R.R.*, 316 Ill. 425, 147 N.E. 449, 451 (1925); *Hall*

Canal or Ditch Co. v. *Colorado Ice & Storage Co.*, 34 Col. 485, 82 P. 940 (1905), where a statute almost identical to the Act of 1849 was construed as allowing the taking of only an easement in lands because that would suffice for the purpose, constructing and operating a ditch, and it was said such language as that appearing in the Act of 1849 does not mean a technical fee. The court below also ignored its own decision in *Hicks* v. *Thomson*, 127 F.2d 1001 (7th Cir. 1942), cert. den. 317 U.S. 659 (1942), reh. den. 317 U.S. 708 (1942), where it held that a railroad was granted only an easement in lands acquired for its tracks by two deeds, first, an 1863 deed reciting that it was "to have and to hold . . . for railroad purposes only" and, second, an 1870 deed covering the same and additional lands reciting "to have and to hold said strip of land . . . for railroad uses and purposes and none other as fully and amply and not more so as if the same had been taken by condemnation. . . ."

v. *Baylous*, 109 W. Va. 1, 153 S.E. 293, 296, 69 A.L.R. 527 (1930); 82 C.J.S. Statutes § 366; 2 Sutherland, Statutory Construction (3rd ed. 1955) § 4510. Instead of concluding that the provisions of the 1849 Act were indicative of the quantum of the estate which the O & M Rd. took in lands for right of way by the 1853 proceedings, the court below should have concluded that the absence of these same provisions from the Act of 1852, under which the proceedings were conducted, was indicative that the estate which was taken was different from that which could have been taken had the proceedings been brought under the 1849 Act.

6. The opinion of the court of appeals contains citations of cases announcing in a broad general way elementary principles of the law of adverse possession relative to the necessity of such possession being actual, visible, exclusive and hostile and the insufficiency of casual and permissive possession. The court has misapplied the Illinois law of adverse possession. As the district court found, the evidence concerning the adverse possession for more than 20 years by the owners of contiguous lands of a strip included in the original right of way but situated outside of the right of way fence met all requirements of the Illinois law and perfected title to that strip in the contiguous landowners under the applicable statute, Illinois Revised Statutes (1961) Ch. 83 "Limitations", § 1 (App. 35). Of significance is the fact that the court of appeals completely overlooked important Illinois cases involving directly the question of adverse possession of railroad rights of way in which the facts are almost identical to those in the case at bar and the issues were found against the railroad. *Donahue* v. *Illinois Central R.R.*, 165 Ill. 640, 46 N.E. 714 (1897); *Illinois Central R.R.* v. *Houghton*, 126 Ill. 233, 18 N.E. 301 (1888); *Illinois Central R.R.* v.

O'Connor, 154 Ill. 550, 39 N.E. 563 (1895). The court of appeals did not state that the findings of the trial judge were clearly against the weight of the evidence. Its judgment is a flagrant violation of the rule that great weight must be attached to the findings of the trial judge sitting as the chancellor in equity cases and where his findings are supported by substantial evidence they will not be reversed unless clearly against the weight of the evidence.[14]

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CRAIG VAN METER
JOHN H. ARMSTRONG
1807 Broadway Ave.
Mattoon, Illinois 61938

JOSEPH F. DIVER
Marathon Oil Company Bldg.
539 S. Main St.
Findlay, Ohio 45840

CLAYTON L. ORN
RILEY B. FELL
Of Counsel

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[14] Rule 52, F.R.C.P., 28 U.S.C.A.; *Aetna Ball & Roller Bearing Co.* v. *Standard Unit Parts Corp.,* 198 F.2d 222, 225 (7th Cir. 1952); *Edwards* v. *Lain,* 112 F.2d 343, 346, 347 (7th Cir. 1940); *Solomon* v. *Benjamin,* 75 F.2d 564, 566 (7th Cir.), cert. den. 295 U.S. 749 (1935).

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 15219 SEPTEMBER TERM, 1965—JANUARY SESSION, 1966

Marathon Oil Company,
Plaintiff-Appellee,

v.

Gail Heath and The Baltimore & Ohio Railroad Company,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois.

MARCH 3, 1966

Before HASTINGS, *Chief Judge,* KNOCH, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is a diversity action in which the Marathon Oil Company, an Ohio corporation and successor of The Ohio Oil Company, sued Gail Heath and The Baltimore & Ohio Railroad Company for a declaration that certain gas and oil leases owned by the plaintiff include a part of the right of way over which the defendant railroad operates its trains in Lawrence County, Illinois. The plaintiff also requested an injunction prohibiting the defendants from drilling for oil and gas upon the lands in question.[1] The district court entered findings of fact

[1] On June 1, 1961, defendant Heath entered into an oil and gas lease with the defendant railroad covering the right of way in question. During the pendency of this action Heath drilled a well on the leased premises. The proceeds from the oil produced have been impounded pending the outcome of this litigation.

and conclusions of law favorable to the plaintiff and by its decree granted the relief requested. This appeal followed.

The Ohio & Mississippi Railroad Company, predecessor in title to the B & O railroad, acquired the right of way in question by condemnation in 1853. The right of way is a parcel of land one hundred and fifty feet in width through the south half of the southeast quarter of section 7, township 3 north, range 12 west, Lawrence County, Illinois. The north and south boundaries of this strip run parallel with the railroad track, seventy-one and seventy-nine feet respectively from the centerline of the track.[2]

The district court construed the condemnation proceedings as granting the railroad merely an easement over the lands condemned. The court held that the fee, including the rights to the mineral deposits, remained in the persons who owned the lands at the time of the condemnation proceedings and that their titles passed by mesne conveyances to the landowners who entered into oil and gas leases with the plaintiff. The court also found that a portion of the right of way which lies south of an old wire fence running parallel to the railroad track had been abandoned by the railroad more than fifty years ago.[3] The court fur-

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[2] At the time of the condemnation proceedings, the lands taken were part of two parcels, one owned by the widow and heirs of Joshua Dudley, deceased, and the other by Commadore P. Phillips. Subsequent to the condemnation proceedings, these lands were subdivided into three parcels, each parcel having a different owner. The parcels are currently known as the Finley tract, the Lanich tract, and the Griggs tract. The plaintiff's oil and gas leases cover these tracts.

[3] The part of the right of way lying south of the fence is approximately twenty-nine feet in width.

ther found that the lessors of the plaintiff and their privies in title have been in "open, notorious, exclusive, hostile and adverse possession" of the "abandoned" part of the right of way for a similar period. The court concluded that the defendants are barred from claiming any interest in the "abandoned portion" of the right of way.

I.

The first issue is whether the B & O railroad has a fee interest in its right of way, subject only to the oil and gas lease granted to defendant Heath, or whether it has merely an easement. The question is one of law, to be resolved by a consideration of the Illinois statutes upon which the condemnation proceedings of 1853 were based and the decisions interpreting these statutes.

The formation of the O & M railroad was authorized by the Illinois legislature February 12, 1851. The railroad was empowered to "lay out, designate and establish" a road not exceeding one hundred and fifty feet in width, to appropriate to its own use all the lands so designated, and to "take grants and conveyances of any and all interests and estates therein." The statute provided that in the event the lands designated could not be obtained by voluntary purchase, "the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An Act to Provide for a General System of Railroad Incorporations.' " The latter statute, approved November 5, 1849, set out a condemnation procedure not material here. The statute did, however, contemplate the taking of a fee by a railroad for use in the construction of its tracks, and thus is material in indicating the powers which the O & M railroad obtained by its legislative charter.

The condemnation actions instituted by the O & M railroad to acquire the right of way in question were prosecuted under an Illinois statute passed June 22, 1852 en-

titled "An Act to Amend the Law Condemning Right of Way for Purposes of Internal Improvement."[4] This statute specifically authorized railroad corporations previously chartered by the legislature to avail themselves of its provisions. It provided for the filing of a petition with the circuit court of the county where the lands proposed to be taken were located, indicating the purpose of the taking. It required the appointment of commissioners to fix the compensation to be awarded the owners of the land and a report of the finding of the commissioners to the court. The act then provided that "upon the making and filing of any report . . . any party interested may appeal . . . but if no appeal is taken, the decisions, estimates and assessments as reported, shall be conclusive . . . and the right and title to that part of each tract required, in respect to which compensation is allowed or damages assessed, shall vest in the . . . corporation . . . upon the payment of the compensation and damages so fixed or assessed. . . ."

The records of the 1853 condemnation proceedings here involved show that they conformed in all respects to the requirements of the 1852 statute. Each petition described the tracts proposed to be taken. Each requested the court to appoint commissioners for the purpose of fixing the compensation to be awarded the owners and further requested that upon payment, "the owners . . . may be required to make and deliver . . . a conveyance or release in fee" to the O & M railroad. The record shows that commissioners were appointed, the compensation to be awarded was set, no appeal was perfected, and payment in the amounts assessed was made. The proceedings in their entirety reflect an intention on the part of the railroad to take an interest

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[4] The 1849 statute was specifically mentioned in the condemnation proceedings, but the parties agree that these proceedings were conducted under the act of June 22, 1852.

in the lands condemned commensurate with the power granted by its charter.

The Illinois Supreme Court has considered the 1852 statute and has held that railroad instituting condemnation proceedings under it acquired fee simple title to the lands condemned. In *Bartlow* v. *Chicago, B. & Q. R. R.*, 243 Ill. 332, 336, 90 N.E. 721 (1909), the court stated:

> Under the statute then in force [the act of June 22, 1852] when property was taken and condemned for public use the condemnation was of the entire property, and the assessment of damages was held to be in satisfaction of all the title to the property, including the fee simple and all lesser estates.

A subsequent case, *Keen* v. *Cleveland, C. C. & St. L. Ry.*, 392 Ill. 362, 64 N.E. 2d 499 (1945), concerned the question of whether a certain deed to a strip of land used for the purpose of a right of way conveyed a fee simple title to The Cairo & Vincennes Railroad Company. That railroad was organized under a special act of the Illinois legislature in 1867 and was empowered to acquire and appropriate as much land as might be necessary for a right of way.[5] The question arose as to whether the railroad had been empowered to take a fee interest in those lands it acquired by voluntary conveyance. In the course of its decision, the court said:

> The eminent domain act of June 22, 1852, referred to in section 4 of the special act creating The Cairo & Vincennes Railroad Company, was construed by this court in Bartlow v. Chicago, Burlington and Quincy Railroad Co. . . . It was there held that in eminent domain proceedings under said act, the railroad company condemning the land acquired fee-simple title to

[5] The legislative charter of The Cairo & Vincennes Railroad Company is basically similar to that under which The Ohio & Mississippi Railroad Company was organized.

> the lands condemned. The rights in and the power to take real estate by . . . the eminent domain act referred to in section 4, was the right to take and acquire fee-simple title.
>
> There was, therefore, by section 4 of the act . . ., specific authority conferred to acquire fee-simple title and all lesser estates in lands by condemnation under the act of June 22, 1852.
>
> • • • • •
>
> It is clear that under the special act creating The Cairo & Vincennes Railroad Company, that company was authorized and empowered to acquire and hold title to real estate in fee simple, either by condemnation or voluntary conveyance. 392 Ill. at 374-75.

From a reading of the act of June 22, 1852 and the decisions just cited, we conclude that the predecessor in title of the defendant railroad acquired a fee in the lands taken in the condemnation proceedings of 1853.[6] The cases relied upon by the plaintiff do not deal with the statutes pertinent to the case at bar and are inapposite for that reason.

II.

The remaining question is whether the adjoining landowners, the plaintiff's lessors, acquired title by adverse possession to the strip of land approximately twenty-nine feet wide lying south of the wire fence on the right of way condemned.

The district court ruled that the railroad had abandoned this strip and that the adjoining landowners had acquired title to it by adverse possession. We need not consider the

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[6] Section 13 of article II of the Illinois constitution, adopted in 1870, effected a change in the condemnation power of railroads from that granted by the statutes we have discussed by providing that railroads may acquire no more than an easement over the right of way taken. This change had no retroactive effect. Peoria & R.I. Ry. v. Birkett, 62 Ill. 332, 336 (1872).

question of abandonment inasmuch as we have already determined that the railroad acquired a fee simple title in its rights of way. A vested legal title to a corporeal interest cannot be lost by abandonment. *Chicago, Wilmington & Franklin Coal Co.* v. *Jilek,* 42 F. Supp. 200, 204 (E.D. Ill. 1942).

Under Illinois law the doctrine of adverse possession must be construed strictly in favor of the owner of the title to the land. *White* v. *Harris,* 206 Ill. 584, 592, 69 N.E. 519 (1903). To acquire title by adverse possession, the possession must be actual, visible, and exclusive. Moreover, it must be hostile in its inception and so continue without interruption for a period of twenty years. *Town of Kaneville* v. *Meredith,* 351 Ill. 620, 624, 184 N.E. 883 (1933). Casual physical acts tending to show a claim of ownership do not constitute adverse possession, and permissive possession, even if long continued, does not confer title on the person in possession. *Chicago & N. W. Ry.* v. *Kennedy,* 344 Ill. 309, 317-18, 176 N.E. 267 (1931); *Nitterauer* v. *Pulley,* 401 Ill. 494, 503, 82 N.E.2d 643 (1948). In *Hankey* v. *VanScyoc,* 338 Ill. 533, 536, 170 N.E. 749 (1930), the Illinois Supreme Court stated the requirements for acquiring title by adverse possession in these terms:

> The presumptions are in favor of the owner of the real title to the land, and to take it away from him on the claim of possession for twenty years the proof must show that the claimant possessed it for twenty years, claiming title and exercising rights of ownership over the land. The possession must be open, notorious, hostile and adverse and must be uninterrupted for a period of twenty years. . . . Adverse possession cannot be made out against the true owner by inference or implication but must be established by clear, positive and unequivocal proof.

Applying the foregoing principles to the evidence in this case, we are of the opinion that the plaintiff failed to establish title to the strip of land in its lessors by adverse possession, and that the district court's contrary determination was erroneous. The evidence showed the existence of a deteriorated wire fence located approximately fifty feet south of the centerline of the railroad track. The plaintiff presented testimony that the fence was at least sixty years old and that it was originally erected and maintained by the railroad to keep errant livestock off its track. The evidence further established that north-south "property line" fences between the Finley, Lanich, and Griggs tracts connected with the railroad's fence. There was also testimony that a portion of the disputed strip of land may have been farmed at one time by the owners of the three adjoining tracts. The testimony in this regard must be characterized as inconclusive. On the other hand, the evidence showed that most of the twenty-nine foot strip in controversy is and at all relevant times was dotted with trees and overgrown with brush. Some of the plaintiff's own witnesses conceded that to their knowledge the tree and brush-covered area had never been cultivated. Nor does the evidence support the inference that the fence erected by the railroad was intended as a boundary designation. From all that appears in the record, the fence was designed only to protect the railroad from possible liability for injury to wandering stock. Further, it appears that the defendant railroad and its predecessor have paid the taxes on the right of way since the condemnation proceedings in 1853.

Thus the plaintiff's burden of providing clear and unequivocal proof that its lessor-landowners acquired title to the disputed strip of land by adverse possession was not sustained.

The decree and judgment of the district court is reversed.

IN THE UNITED STATES DISTRICT COURT
* * (Caption—Civil No. 1882-D) * *

FINDINGS OF FACT and CONCLUSIONS OF LAW
(Filed Mar 15, 1965)

This cause coming on to be heard before the Honorable Casper Platt, Judge of the District Court of the United States for the Eastern District of Illinois, at 9:30 o'clock in the forenoon on the 19th day of October, 1964, on the complaint, as amended, the answers of the defendants, and the evidence of the parties hereto, and the Court having the evidence introduced in said cause, took the case under advisement upon the written briefs and arguments of the counsel for the parties, and being fully advised in the premises makes the following Findings of Fact and Conclusions of Law in this said cause:

Findings of Fact

(1)

That the plaintiff, Marathon Oil Company, an Ohio corporation, is a corporation organized, existing and legally incorporated under the laws of the State of Ohio, and is a citizen of the State of Ohio, having its principal place of business in the City of Findlay, State of Ohio, United States of America; that the defendant Gail Heath is a citizen, resident and inhabitant of the State of Illinois, and that the defendant The Baltimore & Ohio Rail-

road Company is a corporation legally incorporated in the State of Maryland, United States of America, and a citizen of that State having its principal place of business in the City of Baltimore, State of Maryland.

(2)

That the matters in controversy herein exceed, exclusive of interest and costs, the sum and value of Ten Thousand Dollars ($10,000.00).

(3)

That all the parties in this suit have, by their respective counsel, entered into a Stipulation of Facts which has been admitted in evidence in this case as Plaintiff and Defendants' Exhibit "A", and the Court finds that the facts set forth in said Exhibit are true and correct facts and are binding upon all parties to this action.

(4)

That on the 30th day of June, 1906, Amanda Long, unmarried, being then the owner of the following described premises, to-wit:

> The North part of the Southeast Quarter of the Southeast Quarter, containing thirty (30) acres, more or less, and the North part of the Southwest Quarter of the Southeast Quarter, containing thirty-two (32) acres, more or less, all in Section 7, Township 3 North, Range 12 West Lawrence County, Illinois, and all lying North of the B. & O. S. W. R. R., and six (6) acres, more or less, bounded as follows: on the north by said B. & O. S. W. R. R. track, on east by land owned by W. E. Finley, on the south by Indian Creek and on the south and west by Caney land, this

last described six (6) acres of land being part of Sections 7 and 18 and immediately south of the central part of the two tracts of land,

entered into an oil and gas lease on said date with Armor and Stewart, second parties, covering the above described premises, said lease being recorded in the office of the Recorder of Lawrence County, Illinois, in Book 3 page 228. A copy of said oil and gas lease is attached to the Complaint in this said cause and marked Exhibit "A" and is in evidence in this case.

(5)

That on the 3rd day of October, 1952, Bessie E. S. Finley, a widow; William E. Finley and Bessie Finley, his wife; Annie L. Mangum and Dr. W. R. Mangum, her husband; Thomas Finley and Jennie Finley, his wife; Alice Fisher and Leo Fisher, her husband, all of Lawrence County, Illinois; Lois Isabelle Beals and Robert Jennings Beals, her husband, of Urbana, Illinois; Guy W. Fish and Bertha E. Fish, his wife, of Atlanta, Georgia; Paul B. Finley and Genevieve Finley, his wife, of Jasper County, Illinois; Hazel E. Mitchell and Loren Mitchell, her husband, of Richland County, Illinois; Roberta Jane McPheron and Herschel James McPheron, her husband, of Tolono, Illinois; Martha M. Wilson and R. Raymond Wilson, her husband, of Arthur Illinois; Esther Stengel and Donald F. Stengel, her husband, of Mt. Morris, Ogle County, Illinois; and Frank Finley and Mae L. Finley, his wife, of Coles County, Illinois, being the owners of the following described real estate, viz:

All that part of the East 40 rods of the Southeast Quarter of the Southeast Quarter of the Southeast Quarter of Section 7, which lies South of the right-

of-way of the B. & O. S. W. R.R., containing five (5) acres, more or less, in Township 3 North, Range 12 West, Lawrence County, Illinois,

and other premises, entered into an oil and gas lease with E. L. Crusse, party of the second part, of date the 8th of November, 1952, said lease being recorded in Book 33 at page 176 in the office of the Recorder of Lawrence County, Illinois. A true and correct copy of said oil and gas lease is attached to the Complaint in said cause and marked Exhibit "B" and is in evidence in this case.

(6)

That on the 30th day of September, 1958, Harold E. Griggs and Mildred L. Griggs, husband and wife, and John D. Bolles and Mary Bolles, husband and wife, being the owners of the following described real estate, viz:

All that part of the South ½ of the Southeast ¼ of Section 7 lying South of the Right-of Way of the Baltimore & Ohio Southwestern Railroad more particularly described as follows: Commencing at the Southwest corner of the South ½ of the Southeast ¼ of said Section 7, thence running East 94 rods 9 links to a post on the North line of the Northeast ¼ of the Northeast ¼ of Section 18, thence North 16 rods 16 links to the South line of the Right-of-Way of the Baltimore & Ohio Southwestern Railroad, thence West along the South line of the Right-of-Way of said Railroad approximately 94 rods and 18 links to a point on the West line of said South ½ of the Southeast ¼ of Section 7, thence South 6 rods and 8 links to the place of beginning, containing 5.59 acres, more or less, all situated in Township 3 North, Range 12 West, County of Lawrence, State of Illinois,

and other premises, entered into an oil and gas lease with The Ohio Oil Company, now Marathon Oil Company, said lease being recorded in Book 43 pages 59-61 of Oil and Gas Records in the office of the Recorder of Lawrence County, Illinois. A true and correct copy of said lease is attached to the Complaint in this cause and marked Exhibit "C" and is in evidence in this case.

(7)

By virtue of condemnation proceedings conducted in 1853 the Ohio and Mississippi Railroad Company, predecessor of defendant herein, The Baltimore & Ohio Railroad Company, acquired a right of way through the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that by virtue of such condemnation proceedings the Ohio and Mississippi Railroad Company acquired merely an easement over and across the surface of a tract 150 feet in width through the South Half of the Southeast Quarter of said Section 7; that the title to the oil and gas therein and thereunder did not pass by virtue of such condemnation proceedings but remained in the then landowners and has passed to the lessors of plaintiff herein, and that defendant The Baltimore & Ohio Railroad Company has acquired said right of way by mesne conveyances from said the Ohio and Mississippi Railroad Company.

(8)

That a part of the right of way acquired by the Ohio and Mississippi Railroad Company under said condemnation proceedings was abandoned by said railroad company and its successors in title more than fifty years ago, said abandoned part being more specifically identified and described as follows:

All that part of said right of way described in said condemnation proceedings which lies South of and adjacent to a fence which is located South of the center line of that portion of the main track of the Southeast Quarter of said Section 7, the location of said fence through the South Half of the Southeast Quarter of said Section 7 being shown on Plaintiff's Exhibit No. 1 in evidence in this case—the plat prepared by Marbry & Johnson, Surveyors.

That neither of the defendants has any right, title or interest in said abandoned part of said right of way; that the fence mentioned above in the description of said abandoned part of said right of way was erected more than fifty years ago by said Ohio and Mississippi Railroad Company or a successor in title; that the lessors of the plaintiff and their privies in title have been in the open, notorious, exclusive, hostile and adverse possession of said abandoned part of said railroad right of way for more than fifty years last past and during said period have claimed to own the same in fee simple, including the oil, gas and other minerals therein and thereunder, as well as the surface; that as to the balance of said right of way, defendant The Baltimore & Ohio Railroad Company owns no more than an easement; and that in the year 1960 the plaintiff drilled its Lanich No. 13 well on that part of the right of way which plaintiff's lessors had acquired by adverse possession as herein set forth, being that portion of the right of way South of the fence built by said railroad company on the South side of said right of way.

(9)

That plaintiff, Marathon Oil Company, is the owner of each and all said oil and gas leases, and the leasehold estates created thereby; that under and by virtue of

said leases said plaintiff has the exclusive right to drill for oil and gas upon, and produce and remove oil and gas from, the tracts of land respectively described in said oil and gas leases; and under and by virtue thereof has drilled several producing wells on said premises and is currently producing oil and gas therefrom; and that said leases are in full force and effect.

(10)

That the oil and gas leasehold estates created by said oil and gas leases respectively extend from the north and south sides to the center of the right of way of The Baltimore & Ohio Railroad Company through the South Half of the Southeast Quarter of said Section 7; that all of said leases collectively include and cover all of the right of way of defendant The Baltimore & Ohio Railroad Company through the South Half of the Southeast Quarter of said Section 7; that said leases convey to plaintiff an oil and gas leasehold estate covering all the oil and gas in and under the right of way of said The Baltimore & Ohio Railroad Company; that said leases, and the leasehold estates created thereby, collectively include and cover all the oil and gas in and under the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that under and by virtue thereof the plaintiff, Marathon Oil Company, has the exclusive right to drill for, and produce oil and gas from, the entire South Half of the Southeast Quarter of said Section 7, including the right of way of said defendant The Baltimore & Ohio Railroad Company, subject to the right of said defendant to construct and maintain its railroad tracks on that portion of the easement as to which there has been no abandonment thereof by said defendant and its predecessors in title.

(11)

That defendant The Baltimore & Ohio Railroad Company has no right, title and interest in and to the oil and gas in and under its right of way as it extends across and through the South Half of the Southeast Quarter of said Section 7; that defendant The Baltimore & Ohio Railroad Company, a corporation, wrongfully and without any right, title or interest in and to the oil and gas in and under said premises, on the first day of June, 1961, entered into a purported oil and gas lease with defendant Gail Heath covering, among other lands, the right of way of said railroad as it extends across and through the South Half of the Southeast Quarter of said Section 7, said oil and gas lease being recorded in Miscellaneous Record 10 at pages 550-559 in the office of the Recorder of Lawrence County, Illinois, a copy of said lease being attached to the Complaint and marked Exhibit "D" and made a part thereof.

(12)

That defendant Gail Heath made application to the State Mining Board of the State of Illinois for permits to drill two wells on the railroad right of way extending across and through the South Half of the Southeast Quarter of said Section 7; that since the filing of the complaint in, and during the pendency of, this cause, defendants have wilfully, illegally and wrongfully drilled a well for oil and gas on the right of way of The Baltmiore & Ohio Railroad Company which is located north of the South fence and South of the tracks of said railroad company at the place identified as staked location Gail Heath No. 2-A as shown on the plat prepared by Marbry & Johnson, Surveyors, and admitted in evidence herein as Plaintiff's Exhibit No. 1; that said well is still located

thereon and is being operated or is capable of being operated for the production of oil and gas; and that said defendants have produced oil by means of said well and that the proceeds from said oil have been impounded pending litigation.

(13)

That said Heath Well No. 2-A has been drilled on the railroad right of way in violation of the rights of plaintiff; that plaintiff, Marathon Oil Company, has been irreparably damaged by the drilling of said well; that property belonging to plaintiff has been wrongfully taken by said defendants and that in order to properly protect the right, title and interests of plaintiff under its said oil and gas leases, plaintiff is entitled to a judgment in accordance with the prayer of its complaint, including a permanent injunction enjoining said defendants from drilling upon the right of way for oil and gas and from occupying the same for the purpose of drilling for and producing oil and gas for the duration of the period that its oil and gas leases remain in force and effect upon said premises and further including a mandatory injunction that said Heath Well No. 2-A be abandoned and plugged by the defendants at their sole cost, risk and expense and all machinery and equipment used in connection with the pumping and operation of said well be removed from said premises by the defendants.

Conclusions of Law

(1)

That this Court has jurisdiction of this cause.

(2)

That a presumption exists that all conveyances of land touching or bordering upon railroad rights of way, which

are monuments, carry to the middle of said railroad rights of way, and that the defendants have not shown facts sufficient to overcome such presumptions.

(3)

That by virtue of the two condemnation proceedings instituted in 1853, the Ohio and Mississippi Railroad Company, predecessor of defendant The Baltimore & Ohio Railroad Company, acquired as a right of way for its tracks merely an easement over and across the surface of a tract 150 feet in width through the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that the title to the oil and gas in and under such right of way did not pass by virtue of such condemnation proceedings but remained in the then landowners and has passed to the lessors of plaintiff herein; and that the defendant The Baltimore & Ohio Railroad Company has acquired said right of way by mesne conveyances from the Ohio and Mississippi Railroad Company.

(4)

That there has been an abandonment by the Ohio and Mississippi Railroad Company and its successors in title of a part of the right of way acquired by said railroad company, said abandoned part being more specifically identified and described above under the "Findings of Fact"; that the defendants herein are barred from asserting any claim, right, title or interest in and to such abandoned portion of said railroad because the lessors of the plaintiff and parties who are in privity of title with them have been in the open, notorious, exclusive, hostile and adverse possession of said abandoned part of said railroad right of way; and that as to the balance of said right of way, defendant The Baltimore & Ohio Railroad Company owns only an easement.

(5)

That the lease bearing date June 30, 1906, from Amanda Long, unmarried, to Armor and Stewart covering the following described premises, viz:

> The North part of the Southeast Quarter of the Southeast Quarter, containing thirty (30) acres, more or less, and the North part of the Southwest Quarter of the Southeast Quarter, containing thirty-two (32) acres, more or less, all in Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois, and all lying North of the B. & O. S. W. R. R., and six (6) acres, more or less, bounded as follows: on the north by said B. & O. S. W. R. R. track, on east by land owned by W. E. Finley, on the south by Indian Creek and on the south and west by Caney land, this last described six (6) acres of land being part of Sections 7 and 18 and immediately south of the central part of the two tracts of land,

covers and includes lands running to the center of the right of way of The Baltimore & Ohio Railroad Company which bounds and abuts the lands hereinabove described on both the north and south sides thereof and the oil and gas in and under such lands; that said lease thus created an oil and gas leasehold estate covering lands running to the center of said right of way as aforesaid; and that said leasehold estate is now owned by plaintiff, Marathon Oil Company.

(6)

That the oil and gas lease bearing date October 3, 1952, from Bessie E. S. Finley, a widow; William E. Finley and Bessie Finley, his wife; Annie L. Mangum and Dr. W. R. Mangum, her husband; Thomas Finley and Jennie Finley,

his wife; Alice Fisher and Leo Fisher, her husband, all of Lawrence County, Illinois; Lois Isabelle Beals and Robert Jennings Beals, her husband, of Urbana, Illinois; Guy W. Fish and Bertha E. Fish, his wife, of Atlanta, Georgia; Paul B. Finley and Genevieve Finley, his wife, of Jasper County, Illinois; Hazel E. Mitchell and Loren Mitchell, her husband, of Richland County, Illinois; Roberta Jane McPheron and Herschel James McPheron, her husband, of Tolono, Illinois; Martha M. Wilson and R. Raymond Wilson, her husband, of Arthur, Illinois; Esther Stengel and Donald F. Stengel, her husband, of Mt. Morris, Ogle County, Illinois; and Frank Finley and Mae L. Finley, his wife, of Coles County, Illinois, to R. L. Crusse covering the following described lands, viz:

> All that part of the East 40 rods of the Southeast Quarter of the Southeast Quarter of the Southeast Quarter of Section 7, which lies South of the right-of-way of the B. & O. S. W. R. R., containing five (5) acres, more or less, in Township 3 North, Range 12 West, Lawrence County, Illinois,

covers and includes lands running to the center of the right of way of The Baltimore & Ohio Railroad Company which bounds and abuts the lands hereinabove described on the north side thereof and the oil and gas in and under such lands; that said lease thus created an oil and gas leasehold estate covering lands running to the center of said right of way as aforesaid; and that said leasehold estate is now owned by plaintiff herein, Marathon Oil Company.

(7)

That the oil and gas lease bearing date September 30, 1958, from Harold E. Griggs and Mildred L. Griggs, husband and wife, and John D. Bolles and Mary Bolles, hus-

band and wife, to The Ohio Oil Company covering the following described lands, viz:

> All that part of the South ½ of the Southeast ¼ of Section 7 lying South of the Right-of-Way of the Baltimore & Ohio Southwestern Railroad more particularly described as follows: Commencing at the Southwest corner of the South ½ of the Southeast ¼ of said Section 7, thence running East 94 rods 9 links to a post on the North line of the Northeast ¼ of the Northeast ¼ of Section 18, thence North 16 rods 16 links to the South line of the Right-of-way of the Baltimore & Ohio Southwestern Railroad, thence West along the South line of the Right-of-Way of said Railroad approximately 94 rods and 18 links to a point on the West line of said South ½ of the Southeast ¼ of Section 7, thence South 6 rods and 8 link to the place of beginning, containing 5.59 acres, more or less, all situated in Township 3 North, Range 12 West, County of Lawrence, State of Illinois,

covers and includes lands running to the center of the right of way of The Baltimore & Ohio Railroad Company which bounds and abuts the lands hereinabove described on the north side thereof and the oil and gas in and under such lands; that said lease thus created an oil and gas leasehold estate covering lands running to the center of said right of way as aforesaid; and, that said leasehold estate is now owned by plaintiff, Marathon Oil Company.

(8)

That the three oil and gas leases hereinabove described owned by plaintiff, copies of which are attached to the Complaint as Exhibits "A," "B" and "C," and the leasehold estates created thereby, collectively include and cover

all of the right of way, and the oil and gas therein and thereunder, of The Baltimore & Ohio Railroad Company through the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that said leases, and the leasehold estates created thereby, collectively include and cover all the oil and gas in and under the South Half of the Southeast Quarter of said Section 7; that under and by virtue thereof the plaintiff, Marathon Oil Company, has the exclusive right to conduct oil and gas drilling operations on, and produce oil and gas from, the entire South Half of the Southeast Quarter of said Section 7, including the right of way of said defendant The Baltimore & Ohio Railroad Company, subject to the right of said defendant to construct and maintain its railroad tracks on that portion of its right of way as to which there has been no abandonment thereof by said defendant and its predecessors in title.

(9)

That the defendants have no claim, right, title or interest in and to the oil and gas in and under the railroad right of way through the South Half of the Southeast Quarter of said Section 7; that defendant The Baltimore & Ohio Railroad Company is not entitled to lease the same for oil and gas and that neither of said defendants has any right to drill a well thereon and to produce oil and gas thereon and therefrom.

(10)

That the lease made by The Baltimore & Ohio Railroad to defendant Heath, copy of which is attached to the Complaint as Exhibit "D," did not vest any right, title or interest in the said defendant Heath in or to the oil and gas or other minerals in and under any part of the lands in the South Half of the Southeast Quarter of said Section 7.

(11)

That plaintiff, Marathon Oil Company, will be irreparably damaged if the defendants are permitted to drill wells on said right of way or operate wells thereon for the production of oil and gas, and that plaintiff has been irreparably damaged by the drilling of a well on said right of way and by the production of oil and gas therefrom which the defendants have done wilfully, wrongfully and illegally.

(12)

That plaintiff is entitled to a permanent injunction enjoining defendants Gail Heath and The Baltimore & Ohio Railroad Company, a Maryland corporation, and their employees, agents, successors and assigns from drilling upon or occupying or remaining in possession of the railroad right of way through the South Half of the Southeast Quarter of Section 7 for the purpose of drilling upon and from endeavoring to drill thereon for the recovery and production of oil and gas; that plaintiff is entitled to a mandatory injunction against the defendants in this cause requiring them to plug and abandon the well which has been drilled thereon known and identified as Heath Well #2-A and requiring them to remove from the said railroad right of way all machinery and equipment and any other material used in the operation of said well or for the production of oil and gas from said railroad right of way.

(13)

That plaintiff has the right to continue to produce its Lanich Well No. 13 and to receive the oil and gas therefrom and to dispose of the same in accordance with the terms of its oil and gas lease.

Dated this 15th day of March, 1965.

/s/ Casper Platt
United States District Judge
(Seal)

IN THE UNITED STATES DISTRICT COURT
* * (Caption—Civil No. 1882-D) * *

DECREE
(Filed Mar 15, 1965)

This cause having come on for final hearing before the Honorable Casper Platt, Judge of the United States District Court for the Eastern District of Illinois, on the Complaint herein as amended, the Answers of the defendants to the Complaint as amended, and evidence and stipulations of the parties hereto, and having heard the arguments of counsel and having made Findings of Fact and Conclusions of Law, which are filed with the Clerk of this Court at the same time as this Decree herein, and being fully advised in the premises, Therefore, Upon consideration thereof,

It Is Ordered, Adjudged And Decreed as follows:

(1)

That the equities in this cause are with the plaintiff, Marathon Oil Company, an Ohio corporation, and that plaintiff is entitled to the relief as prayed in the complaint as amended.

(2)

That by virtue of condemnation proceedings conducted in 1853, the Ohio and Mississippi Railroad Company, predecessor of defendant The Baltimore & Ohio Railroad Company, acquired as a right of way for its tracks merely an easement over and across the surface of a tract of land 150 feet in width through the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that the title

to the oil and gas in and under such right of way did not pass by virtue of such condemnation proceedings but remained in the then landowners and has passed to the lessors of the plaintiff herein; and that defendant The Baltimore & Ohio Railroad Company has acquired said right of way by mesne conveyances from the Ohio and Mississippi Railroad Company.

(3)

That plaintiff, Marathon Oil Company, is the owner of oil and gas leases which are in full force and effect, and the leasehold estates created thereby, covering the following described lands, to-wit:

A. The North part of the Southeast Quarter of the Southeast Quarter, containing thirty (30) acres, more or less, and the North part of the Southwest Quarter of the Southeast Quarter, containing thirty-two (32) acres, more or less, all in Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois, and all lying North of the B. & O. S. W. R. R., and six (6) acres, more or less, bounded as follows: on the north by said B. & O. S. W. R. R. track, on east by land owned by W. E. Finley, on the south by Indian Creek and on the south and west by Caney land, this last described six (6) acress of land being part of Section 7 and 18 and immediately south of the central part of the two tracts of land,

B. All that part of the East 40 rods of the Southeast Quarter of the Southeast Quarter of the Southeast Quarter of Section 7, which lies South of the right-of-way of the B. & O. S. W. R. R., containing five (5) acres, more or less, in Township 3 North, Range 12 West, Lawrence County, Illinois,

C. All that part of the South ½ of the Southeast ¼ of Section 7 lying South of the Right-of-Way of the Baltimore & Ohio Southwestern Railroad more particularly described as follows: Commencing at the Southwest corner of the South ½ of the Southeast ¼ of said Section 7, thence running East 94 rods 9 links to a post on the North line of the Northeast ¼ of the Northeast ¼ of Section 18, thence North 16 rods 16 links to the South line of the Right-of-Way of the Baltimore & Ohio Southwestern Railroad, thence West along the South line of the Right-of-Way of said Railroad approximately 94 rods and 18 links to a point on the West line of said South ½ of the Southeast ¼ of Section 7, thence South 6 rods and 8 links to the place of beginning, containing 5.59 acres, more or less, all situated in Township 3 North, Range 12 West, County of Lawrence, State of Illinois.

(4)

That the aforesaid oil and gas leases owned by plaintiff, and the leasehold estates created thereby, collectively include and cover all of the right of way, and the oil and gas therein and thereunder, of The Baltimore & Ohio Railroad Company through the South Half of the Southeast Quarter of said Section 7; that said leases, and the leasehold estates created thereby, collectively include and cover all the oil and gas in and under the South Half of the Southeast Quarter of said Section 7; that under and by virtue thereof the plaintiff, Marathon Oil Company, has the exclusive right to conduct oil and gas drilling operations on, and produce oil and gas from, the entire South Half of the Southeast Quarter of said Section 7, including the right of way of said defendant The Baltimore & Ohio Railroad Company, subject to the right of said defendant to con-

struct and maintain its railroad tracks on that portion of its right of way as to which there has been no abandonment thereof by said defendant and its predecessors in title.

(5)

That the defendants Gail Heath and The Baltimore & Ohio Railroad Company have no right, title or interest in and to the oil, gas and other minerals under the right of way of said The Baltimore & Ohio Railroad extending through the South Half of the Southeast Quarter of said Section 7.

(6)

That defendants Gail Heath and The Baltimore & Ohio Railroad Company and each of them and their respective agents, officers, employees and assigns are hereby permanently enjoined from conducting or endeavoring to conduct oil and gas drilling operations on, and producing oil and gas from, any part of the lands covered by the oil and gas leasehold estates owned and held by the plaintiff as hereinabove described, including the entire South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois, and especially the railroad right of way extending across and through the aforesaid lands; and said defendants are further permanently enjoined from operating or endeavoring to operate any well heretofore drilled by them for the production of oil and gas, including the one known as Heath Well #2-A, on the railroad right of way extending through the South Half of the Southeast Quarter of said Section 7—all so long as the leases held by the plaintiff on the above described lands are in force and effect.

(7)

That a mandatory injunction is hereby entered and under it said defendants are ordered and directed to abandon and plug the producing well known as Heath Well #2-A which has been drilled on the railroad right of way running through the South Half of the Southeast Quarter of said Section 7, and said defendants are further ordered and directed to remove from said right of way any and all machinery, equipment and supplies that they now have on said premises and used in, on and about the operation of said well and the production of oil and gas from said premises.

(8)

That defendants Gail Heath and The Baltimore & Ohio Railroad Company pay all costs of this proceedings to be taxed by the Clerk of this court and that execution issue therefor.

Entered this 15 day of March, 1965.

/s/ Casper Platt
Judge of the United States
District Court for the Eastern
District of Illinois

(Seal)

An Act to Amend the Law Condemning Right of Way for Purposes of Internal Improvement, In force June 22, 1852.[1]

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That when any public road, railroad, plank road, turnpike-road, canal, or other public work shall have been located by any officer or agent of the State or of any county, or any person or corporation vested with power to take and apply private property in the construction or use of such road, canal, or other work, or for any purpose connected with the same, such as constructing bridges, dams, locks, embankments, excavations, spoil banks, turnouts, depots, engine-houses, shops, turntables, boat yards, wharves, or docks, and the right or title to property required for any such uses or purposes cannot be obtained by purchase, a petition shall be filed in the clerk's office of the circuit court of each county, through which the location aforesaid is made, setting forth by reference, the authority to construct the work, and the right to take and apply private property, and if the right of way only is desired, describing by its numbers, or other appropriate description, each lot or parcel of land over or across which such right is desired; or if property is required for all or any of the other purposes herein specified, stating such purpose, and describing the property so required; and in either or both cases, stating the names of all persons interested, as owners or otherwise, in the property to be affected, if known, or if

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[1] This Act also appears as §§ 7-24, inclusive, of Ch. 92 entitled "Right of Way" of Gross' Statutes of Illinois 1818-1869, 3d ed. (published by E. L. and W. L. Gross 1870).

not known, stating that fact, and requesting such court to cause to be ascertained the compensation to be made to each owner of, or person interested in, property required as aforesaid, and upon payment thereof to require a conveyance or release of the same, or that by an order or orders of court, the right and title be invested in the state, county, corporation, or other person in whose name or behalf the petition is filed, to be applied and used for the purposes stated in the petition.

§ 2. Upon the filing of the petition aforesaid, and giving the persons interested in the property required reasonable notice thereof, and of the time and place of making the application herein provided for, the petitioner in person, or by attorney, may apply to the judge of said court, or to the judge of the county court or either of the associate justices of the last named court, to appoint commissioners to fix the compensation to be made to the parties interested as aforesaid, for the right of way over or across land, and for land required for any of the other purposes herein expressed, as well as to assess the damages which may result from the construction and use of the road, canal, or other contemplated work. Upon the hearing of which application, and each of the parties notified as aforesaid as well as those not notified who may appear, the said judge, or associate justices, shall select and appoint three disinterested freeholders of the county commissioners to fix compensation and assess damages, according to the prayer of the petition, and also fix the time and place of their first meeting. And upon notices given as aforesaid, from time to time, or the appearance of parties without notice, the same or other commissioners shall be appointed to act with reference to parties, as they are notified, or appear, as aforesaid, until action shall be had with refer-

ence to all the parties and matters named in the petition; provided, that reasonable notice of the time and place of making application for the appointment of commissioners shall be five days, and one day in addition for every twenty miles travel from the residence of the party to the place of making application.

§§ 3 and 4. * * *

§ 5. Commissioners appointed as aforesaid shall be sworn before some officer having power to administer oaths, "to faithfully and impartially execute the duties required of them, according to their best judgment and understanding, and to make all their estimates and assessments according to law." And upon being sworn as aforesaid, they shall meet at the time and place fixed by the court, or judge or justices aforesaid, and proceed without delay, upon view and inspection of the premises, as well as upon hearing the allegations and testimony of the parties interested, to fix the compensation to be made to each party or owner of lands to be taken and used as the way on which the road, canal or other work shall be constructed and pass, also for lands taken and used for any of the other purposes specified in this act; and also estimate and assess the damages sustained by any person or persons, by reason of the construction and use of the work specified in the petition, taking into consideration and estimating the benefits and advantages to the parties resulting from the construction and use of the road, canal, or other improvement: *provided*, the said commissioners shall not estimate any benefits or advantages which may accrue to lands affected in common with adjoining lands, on which such road or canal or other work does not pass.

§ 6. The commissioners shall, from time to time, as they make decisions with reference to lands embraced in their appointment, make reports in writing, stating separately

the compensation to be paid for the right of way over or upon each lot of land, the compensation to be paid for each lot of land required for any other purpose, and the damage allowed to each owner or party by reason of the construction and use of the improvement or work as aforesaid. A copy of each report so made shall be delivered to each of the parties interested, if requested, and the original, with a copy of the order of appointment, shall be filed with the clerk of the court in which the proceedings is had.

§ 7. Upon the making and filing of any report as aforesaid, any party interested may appeal from the decision of the commissioners to the circuit court of the county, as hereinafter provided; but if no appeal is taken, the decisions, estimates and assessments as reported, shall be conclusive upon the parties, and the right and title of that part of each lot or parcel of land required as aforesaid, in respect to which no compensation is allowed or damages assessed, should vest in the state, county, corporation or person in whose behalf the proceeding is had, with the right to enter upon and use and apply the same according to the prayer of the petition and right of the case, and the right and title to that part of each tract of land required, in respect to which compensation is allowed or damages assessed, shall vest in the state, county, corporation or person petitioning as aforesaid, upon the payment of the compensation and damages so fixed or assessed, with the right to enter upon and use and apply the same for the purposes stated in the petition.

§§ 8-13. * * *

§ 14. Appeals shall bring before the court the questions decided or reported on by the commissioners in respect to the parties to the appeal, and unless the parties otherwise agree, the said questions shall be submitted to and tried by a jury as other appeal cases—the jury to swear "well and truly to try the cause, and in fixing compensation or assessing damages, they will be governed by the provisions of the law under which the trial is had." The jury shall find and state the amount, if any thing, which shall be paid as compensation for right of way; the amount, if any thing, to be paid for lands required for any other purpose; and the amount, if any thing, assessed or allowed as damages, making the verdict conform to the questions and facts in the case. Verdicts may be rendered in writing or stated orally in court, and the court shall in all cases require the verdict to be recorded in such form as to express truly and fully the finding of the jury.

§ 15. Upon verdicts rendered by juries, judgments shall be entered declaring that upon the payment of compensation and damages, or either, as the case may be, that the right and title to the same for which the compensation is to be made, or on account of which damages are allowed, shall vest in the state, county, corporation, or person petitining as aforesaid, with the right to enter upon, use and apply the same for the purposes stated in the petition; or if the verdict is that no compensation shall be made in money, or damages be allowed in the premises, the like judgment shall be entered; and verdicts and judgments entered as aforesaid shall be final and conclusive between the parties.

§§ 16-8. • • •

§ 19. All corporations heretofore created by special charter of incorporation or under the general law where the termini have been fixed by the legislature, and none others, may avail themselves of this act.

§ 20. • • •

§ 21. This act to take effect and be in force from and after its passage.

Approved June 22, 1852.

SECTION 1 OF "AN ACT IN REGARD TO LIMITATIONS" Approved April 4, 1872, Laws 1871-1872, p. 556, Illinois Revised Statutes (1961) Ch. 83 "Limitations"

§ 1: No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises, except as now or hereafter provided in subsequent sections of this Act.

AN ACT to incorporate the Ohio and Mississippi Railroad Company, and for other purposes. In force Feb. 12, 1851

Section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly,* That Joseph G. Bowman, Sidney Breese, James Hall, Alfred Kitchell, Arthur McCauley, George W. Pace, Benjamin Bond, James L. D. Morrison, A. T. Ellis, John Ross, Luther M. Kennett, John O'Fallon, James H. Lucas, Andrew Christy, Daniel D. Page, John Law, Peter Chouteau, jr., Benjamin F. Rittenhouse, Samuel B. Chandler, John A. McClernand, John S. Martin, Aaron Shaw, William W. Roman, Green C. Crosson, and such other persons as may associate with them for that purpose, are hereby made and constituted a body corporate and politic, by the name and style of "The Ohio and Mississippi Railroad company," with perpetual succession, and by that name and style shall be capable in law of taking, purchasing, holding, leasing, selling and conveying estate and property, whether real, personal or mixed, so far as the same may be necessary for the purposes hereinafter mentioned, and no further; and in their corporate name may sue and be sued, to have a common seal, which they may alter or renew at pleasure, and may have and exercise all powers, rights, privileges and immunities which are of may be necessary to carry into effect the purposes and objects of this act, as the same are hereinafter set forth.

§ 2. The Ohio and Mississippi Railroad company shall have full power and authority to locate, and from time to time to alter, change, re-locate, construct, re-construct, and fully to finish, perfect and maintain a railroad, with one or more tracks, commencing at Illinoistown, on the Mississippi river, in the county of St. Clair, and running from

thence, on the most eligible route, to the east line of the state of Illinois, in the direction of the city of Vincennes, in the state of Indiana, and to transport, take and carry property and persons upon said railroad, by power or force of steam, or of animals, or of any mechanical or other power, or combination of them, which said company may choose to use or apply. And for the purpose of constructing said railroad or way, said company shall have authority and power to lay out, designate and establish their road, in width not exceeding one hundred and fifty feet, through the entire line thereof, and may take and appropriate to their own use all such lands so designated for the line and construction of said road, upon first paying or tendering therefor such amount of damage as shall have been settled by appraisal, in the manner hereinafter provided, on all such lands as may be taken, or upon any track which may be located by said company, and for the purpose of cuttings and embankments, and for the purpose of obtaining of stone, sand and gravel, may take and appropriate as much more of land as may be necessary for the proper construction, maintenance and security of said road, and for the construction and security of said road, and for constructing shops, depots, and other suitable, proper and convenient fixtures, in connection with and appurtenances to said railroad, may take and have, use and occupy any lands upon either side of said railroad, not exceeding two hundred feet in depth from said railroad; said company taking all such lands as gifts, or purchasing or making satisfaction for the same, in the manner hereinafter provided: *provided*, that this section shall not be construed to restrict or prevent the construction of public roads, or canals, or railroads, across the road of said company, when deemed expedient, but so as not materially to impair or obstruct the same.

§ 3. * * *

§ 4. The said company shall have power and authority to receive, take and hold all such voluntary grants and donations of land and real estate for the purposes of said railroad, as may or shall be made to said company, to aid in the construction, maintenance and accommodation of said railroad; and said company may contract and agree with the owners or occupiers of any land upon which said company may wish to construct said railroad or way, or which said company may wish to use or occupy for the purpose of procuring stone, sand, gravel or earth, or other materials, to be used in embankments or otherwise, in or about the construction, repair, or enjoyment of said railroad, or which said company may wish to use or occupy in any manner or for any purpose or purposes connected with said railroad, for which said company is empowered or authorized by this act to take, have or appropriate any lands, and to receive and take grants and conveyances of any and all interests and estates therein, and to them and to their successors or assigns in fee, or otherwise; and in case said company cannot agree with such owners or occupiers of such lands as aforesaid, so as to procure the same by the voluntary deed or act of such owners or occupiers thereof, or if the owners or occupiers, or any or either of them, be a *femme covert*, infant, *non compos mentis*, unknown or out of the county in which the land or property wanted may lie or be situate, the same may be taken and paid for, if any damages are awarded, in the manner provided for in "An act to provide for a general system of railroad incorporations," approved November 5th, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, privileges, franchises and immunities in said act contemplated; and provided that

any appeal that may be allowed under the provisions of the act above recited, or by virtue of any general law of this state, shall not affect the possession by said company of the land appraised; and when the appeal may be taken or writ of error prosecuted by any person or persons other than the said company, the same shall not be allowed except on the stipulation of the party so appealing or prosecuting such writ of error, that the said company may enter upon and use the lands described in the petition for the uses and purposes therein set forth, upon said company giving bond and security, to be approved by the clerk of said court, that they will pay to the party so appealing or prosecuting such writ of error, all costs and damages that may be awarded against them on the final hearing of such appeal or writ of error, within thirty days after the rendition thereof, or forfeit all right to use the land or way so condemned.

§§ 5-16. • • •

§ 17. The said company hereby chartered shall be required • • •.

§ 18. • • •

§ 19. This act shall be deemed and taken as a public act, and shall be in force from and after its passage; • • •

Approved Feb. 12, 1851.

AN ACT TO PROVIDE FOR A GENERAL SYSTEM OF RAILROAD INCORPORATIONS,[2]

In Force November 5, 1849

Sec. 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, that any number of persons, not less than twenty-five, being subscribers to the stock of any contemplated railroad, may be formed into a corporation for the purpose of constructing, owning and maintaining such railroad, by complying with the following requirements:

* * *

Sections 2-20 * * *

Section 21. Every such Corporation shall possess the general powers and be subject to the general liabilities and restrictions expressed in the special powers following, that is to say:

1st. * * * *

2nd. To receive hold and take such voluntary grants and donations of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of said Railroad, but the real estate thus received by voluntary grants shall be held and used for the purposes of such grants only.

3rd. To purchase, and by voluntary grants and donations receive and take and by its officers, engineers and surveyors and agents enter upon and take possession of and hold and use all such lands and real estate and other

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[2] This Act also appears as §§ 39-84, inclusive, of Ch. 86a entitled "Railroads" of Gross' Statutes of Illinois 1818-1869, 3d ed. (published by E. L. and W. L. Gross 1870).

property as may be necessary for the construction and maintenance of its Railroad and stations, depots, and other accommodations necessary to accomplish the object for which the Corporation is created, but not until the compensation to be made therefor as agreed upon by the parties ascertained as hereinafter prescribed be paid to the owner or owners thereof, or deposited as hereinafter directed, unless the consent of such owner be given to enter into possession.

4th. To lay out its road, not exceeding six rods wide, and to construct the same and for the purposes of cuttings and embankments and procuring stone and gravel may take as much more land within the limits of its charter, in the manner provided hereinafter as may be necessary for the proper construction and security of the Road.

5th.-11th * * *

Section 22. Any number of persons not less than thirteen, intending to organize a Corporation under the provisions of this Act, and every Company that may hereafter organize under this act may present a petition to the Legislature, stating the place from and to which they propose to construct their Road, and its location and route with reasonable certainty, or that they intend to run the said Road on the most direct and eligible route between the points of terminis and praying the Legislature to determine whether the construction of the said proposed Road will be of sufficient public use to justify the taking of private property for the construction of the same. And if the Legislature shall determine and decide by law that such proposed Road will be of sufficient public utility to justify the taking of private property for the constructing and maintaining said Road under the provisions of this

act then such Company when organized may enter upon, take possession of and use all such lands, real estate, as may be required for the construction and maintenance of their Railroad, and the covenant accommodations appertaining to the same, making compensation in the manner hereinafter provided for all lands real estate thus taken possession of and used, except such as may be voluntarily given to or purchased at an agreed price by the said Corporation. Whenever the said Corporation shall not have acquired by gift or purchase any land real estate so required as aforesaid, or which may be affected by any operation connected by such construction and maintenance the said Corporation may present to the Circuit Court of the district where said lands or real estate shall lie a petition signed by its attorney or agent describing with convenient accuracy and certainty by map or otherwise the lands or real estate so required to be taken or affected as aforesaid setting forth the name and residence of each owner or other person interested therein as owner, lessee, incumbrances as far as known to such Attorney or agent or appearing of record and praying the appointment of Commissioners to ascertain the compensation to be made to such owners and persons interested, for the taking or injuriously affecting such land or real estate as aforesaid. The Court shall have satisfactory evidence that notice of an intended application and the time and place thereof for the appointment of Commissioners of appraisement between said Corporation and the owners and persons interested in such lands and real estate had been given at least ten days previously to such owners personally or to some person of suitable age at their residence or on the premises, or by the publication thereof in a news-

paper printed in the County in which such lands or real estate may lie, such publication to be allowed only in respect to owners who shall appear by affidavit to have no residence in the County known to such Agent or Attorney whereat such notice could be delivered as aforesaid. The Court may adjourn the proceedings from time to time, shall direct any future notice thereof to be given that may seem proper, shall have proofs and allegations of all parties interested touching the regularity of the proceedings and shall by an entry in its minutes appoint five competent and disinterested persons Commissioners to ascertain such compensations as aforesaid specifying in such entry a time and place for the first meeting of such Commissioners. The said Commissioners before entering upon the duties of their office shall take the oath required by the laws and Constitution of this State, and any one of them may administer oaths to witnesses produced before them — and may adjourn and may hold meetings for that purpose.

Whenever they shall meet to hear proofs and allegations unless by appointment of the Court or pursuant to adjournment they shall cause reasonable previous notice of such meetings to be given to the said owners or parties interested, or their Attorney or agent, and may each of them issue subpoenas and compel witnesses to appear and testify they shall hear the proofs and allegations of the parties and any three or more of them after reviewing the premises without fear or favor, or partiality, ascertain and certify the compensation proper to be made to the said owners and parties interested for the lands or real estate to be taken, as well as all damages accruing to the owner of the lands and real estate aforesaid, taken in consequence of the condemnation of the same or injuriously affected as aforesaid — making such deduction or allowance for real benefit or advantages which such owners or

parties interested may derive from the construction of said Road, and may in their discretion assess a separate reasonable sum in favor of such owners and parties interested or of any person appointed by the Court to appear as Attorney for them for costs expenses and reasonable counsel fees. They or a majority of them shall make subscribe and file with the Clerk of the County or with the Clerk of the County Commissioners' Court in which such lands or real estate shall lie, a certificate of their said ascertainment and assessment in which such lands or real estate shall be described by map or otherwise with convenient accuracy and certainty. The Court upon such certificate and due proof that such compensation and separate sums, if any be certified have been paid to the parties entitled to the same, or have been deposited to the credit of such parties in the State Treasury or other place for that purpose approved by the Court shall make and cause to be entered in its minutes a rule describing such lands or real estate in manner aforesaid such ascertainment of compensation with the mode of making it and such payment or deposit of the same compensation as aforesaid a certificate copy of which rule shall be recorded and indexed in the proper Recorder's Office, in like manner and with the like effect as if it were a deed of conveyance from the said owners and parties interested to the said Corporation. Upon the entry of such rule the said Corporation shall become seized in fee of all the lands and real estate described in said rule as required to be taken as aforesaid — during the continuance of the Corporation by this or any subsequent act and may take possession of and hold and use the same for the purposes of said Road and shall thereupon be discharged from all claim for any damages by reason of any matter specified in said petition, certificate, or rule of said Court.

* * * * *

And the Legislature hereby reserves (the right) to itself to indicate the routes and termini of said roads, and the same shall not be constructed or commenced without the expressed sanction of the Legislature of this State, by a law to be passed hereafter.

Sections 23-45 • • • •

Sec. 46 This Act shall take effect and be in force from and after its passage.

Approved Nov. 5, 1849

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No. [redacted] 205

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

MARATHON OIL COMPANY, a Corporation,
Petitioner,

vs.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENTS.

JOHN P. WHAM
212 East Broadway
Centralia, Illinois

FREDERICK E. MERRITT
220 West Main Street
Salem, Illinois

MAURICE E. GOSNELL
Room 1, Gee Building
Lawrenceville, Illinois
Attorneys for Respondents.

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MISCELLANEOUS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 1387

MARATHON OIL COMPANY, a Corporation,
Petitioner,

vs.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENTS.

Respondents, Gail Heath and The Baltimore & Ohio Railroad Company, a Corporation, present this Brief in opposition to the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals, For the Seventh Circuit entered on March 3, 1966.

I.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR A REVIEW ON A WRIT OF CERTIORARI.

Problems of area unitization for oil production usually increase with ownerships and it is probable that the Court of Appeals Judgment will invade Petitioner's convenience.

While this may be considered distasteful, the judgment cannot be logically viewed as a stem to chaos, presenting

special and important reasons for review or justifying further argument that the applicable Illinois Law is contrary to the specific pronouncements of its Supreme Court.

The multitude of oil field titles—varying in source and "quantum of estate"—will exist regardless of this judgment and, of course, legislative processes may be invoked when the public interest demands unit operation of an oil producing area.

II.

THE DECISION IS RIGHT.

A. Fee Title was acquired by the 1853 condemnations.

The Illinois Supreme Court has pronounced that in eminent domain proceedings under the early statutes, here involved, the condemning Railroad Company *did* acquire fee title to the lands condemned.

> *Bartlow* v. *C. B. & Q. R. R. Co.*, 243 Ill. 332, 336, 90 N. E. 721; (1909).
> *Keen* v. *C. C. C. & St. L. Ry. Co.*, 392 Ill. 362, 374, 64 N. E. 2d 499. (1945).

In *Bartlow* (p. 336) it is specifically stated:

> "Under the statute then in force, when property was taken and condemned for public use the condemnation was of the entire property, and the assessment of damages was held to be in satisfaction of all the title to the property, including the fee simple and all lesser estates."

And in *Keen* (p. 374) it is said:

> "The eminent domain act of June 22, 1852, referred to in Section 4 of the Special Act creating the Cairo & Vincennes Railroad Company, was construed by this Court in *Bartlow* v. *Chicago, Burlington & Quincy*

> *Railroad Co.*, 243 Ill. 332, 90 N.E. 721 (1909). It was there held that in eminent domain proceedings under said Act, the railroad company condemning the land acquired fee simple title to the lands condemned •••".

These authorities are neither overruled nor changed and stand as Illinois Law applicable in this case.

The Illinois policy and law of condemnation *was* changed by the 1870 Constitution. Section 13 of Article II provides:

> "Private property shall not be taken or damaged for public use without just compensation. Such compensation, where not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners subject to the use for which it is taken." (Ill. Rev. Stats. 1965 Bar Ass'n. Ed. p. 11)

The Illinois Eminent Domain Act was thereafter adopted and "approved April 30, 1872. L. 1871-2, p. 402". (Ill. Rev. Stats., 1965, Bar Ass'n. Ed. Ch. 47).

It is axiomatic that condemnation decisions or legal pronouncements predicated upon or influenced by this changed policy and law of condemnation are not applicable herein.

In *Peoria & Rock Island R. R.* v. *Birkett*, 62 Ill. 332, 336-337 (1872), it is said:

> "The charter of the company, granted March 7, 1867, provides: that all real estate taken, condemned, or appropriated, for the right of way, shall be held by the company in fee simple.
>
> The present constitution provides: that the fee of land taken for railroad tracks, without the consent of the owners, shall remain such owners, subject to the use for which it was taken. Art. 2, Sec. 13.

"The proceedings for condemnation were commenced prior to the adoption of the constitution; and the question raised is, whether upon the facts the company will obtain the fee, or only the use of the land.

"The first section of the schedule of the constitution saves all actions, prosecutions, etc., of individuals or bodies corporate, and makes them as valid as if the constitution had not been adopted.

"We do not decide as to the effect of the constitution upon the charter of the company; but are of the opinion that, as the company had commenced proceedings for condemnation before the adoption of the constitution, such proceedings were continued as valid, and must be governed by the charter."

In *Toledo, Peoria and Warsaw Railway Co.* v. *Pence*, 68 Ill. 524, 528-530 (1873), it is said:

"We are not apprised of any general law, in force in this State, prohibiting stock from running at large, nor of any statute modifying the act of 1855. Appellants contend that it is virtually repealed by the constitution, and the Eminent Domain Act, passed in conformity thereto, in force July 1, 1872. It is urged that the law of 1855 was based on the principle that railways were the absolute property of the railroad company—their private property—as fully so as the adjoining farms were the property of their respective owners; that when they condemned the right of way the fee vested in them, and, being such absolute owners, it was right they should be held rigidly to the fulfillment of their contracts with adjoining owners.

"It is then urged, that the new constitution changed the old rule and established new principles in the management of railroads, by section 12, of Article 11, they are declared public highways; and by Section 13, of Article 2, the fee of land taken for railroad tracks, without consent of the owner thereof, remains in such owner, subject to the use for which it is taken.

"As to the declaration in the constitution, that railways are public highways, they are so, as defined by this Court in *The Central Mil. Tract R. R. Co.* v. *Rockafellow,* 17 Ill. 541. They are not common highways in the sense of public wagon roads, upon which every one may transact his own business with his own means of conveyance, but only in the sense of being compelled to accept of each and all, and take and carry to the extent of their ability.

"By this clause in the constitution we fail to see any design on the part of its framers to relieve these companies from any liability imposed upon them by prior legislation. They will remain liable to the requirements of the acts of 1855 and 1869.

"As to the other clause, the facts in this case show the right of way of this company was acquired, if at all, long anterior to the adoption of the present constitution. The proof is, the killing took place in August, 1872, and the road had been opened for use more than six months prior thereto. *The company, then, had the fee in the right of way, as we must presume,* nothing being alleged or shown to the contrary. But whether they owned the fee or a perpetual easement, they were bound to fence the line of their road, and failing to do so they become liable in damages, without any proof of actual negligence. Negligence, in such cases, is presumed." (Emphasis Ours)

Bonner et al v. *Peterson,* 44 Ill. 253 (1867), considers the effect of land condemnations prior to the 1870 constitution. The Illinois Supreme Court in its opinion (44 Ill. p. 258) states:

"When property is so taken and condemned, *it must be presumed,* that *the commissioners condemned the entire property and title thus appropriated,* unless their report shows the contrary. *And the assessment of the damages,* unless it otherwise appears, *must be held to be in satisfaction of all the title to the prop-*

erty, including the fee simple, and all lesser estates." (Emphasis Ours)

The condemnation proceedings here under consideration reflect a clear intent to take and a taking of the fee, and all lesser estates. Certainly, there is no language which can logically overcome the legal presumption to that effect.

Petitioner's assertion to the contrary is first based upon the false premise that "right of way" as used in the "Act To Amend the Law Condemning Right of Way for Purposes of Internal Improvement, approved June 22, 1852" is but an easement and not a tract of land subject to acquisition in fee.

The term "right of way" as applied to a railroad company has a twofold signification—"a right of crossing and a strip of land which a railroad takes upon which to construct its railroad". *Joy* v. *City of St. Louis,* 138 U. S. 1, 34 L.Ed. 843-857 (1890); *Missouri K. & T. Co.* v. *Roberts,* 152 U. S. 114, 116, 38 L. Ed. 377, 379 (1893); *New Mexico* v. *U. S. Trust Co.,* 172 U. S. 171, 182 43 L. Ed. 407, 411 (1893).

From a reading of the "Act to Amend the Law Condemning Right of Way for Purposes of Internal Improvement, approved June 22, 1852" it becomes apparent that "right of way" as there used, is the "strip of land which a railroad company takes upon which to construct its railroad".

The Illinois Supreme Court so holds and such broad usage of the term "right of way" has official recognition in the specific policy change brought about by the 1870 Constitution.

Petitioner relies heavily upon *Tallman* v. *Eastern Illinois and Peoria R. R.*, 379 Ill. 441, 446-447, 41 N. E. 2d 537, 540 (1942) which construes a 1912 "right of way deed" to the railroad company "as and for its right of way, a strip of land * * *". The opinion was delivered in 1942 by Justice Gunn who was on the Illinois Court and concurred in the January, 1946 opinion of *Keen* v. *C. C. C. & St. L. Ry. Co.*, 392 Ill. 362, 64 N. E. 2d 499 (1945). It is lengthy and contains much dictum but with reference to the applicable rules of construction states: "The cardinal and all important one is to ascertain the intention of the parties, and such deed should be so construed as to carry out the intention as gathered from the entire instrument, and the purpose, if legal, should be carried into effect so as to not defeat the manifest intention * * * and every word and clause within the instrument should be considered, and if possible given effect; * * *"

Other "deed construction cases", without application but cited by Petitioner, are: *Kurz* v. *Blume*, 407 Ill. 383, 385, 95 N. E. 2d 338, 339 (1950), *Carter Oil Co.* v. *Welker*, 317 U. S. 592 (1942), *Hicks* v. *Thomson*, 127 Fed. 2d 1001 (7th Cir. 1942), Cert. den. 317 U. S. 659 (1942), Reh. den. 317 U. S. 708 (1942); *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, 520-521, 30 N. E. 2d 24, 26-27 (1940); *Texas Co.* v. *O'Meara*, 377 Ill. 144, 150-152, 36 N. E. 2d 256, 258-259 (1941); *Carter Oil Co.* v. *Myers*, 105 Fed. 2d 259, 261 (7th Cir. 1939).

Petitioner does cite a number of cases involving condemnations.

An early Illinois condemnation (one prior to the 1870 Constitution) is the subject of *Tacoma Safety Deposit Co.* v. *City of Chicago*, 247 Ill. 192, 93 N. E. 153 (1910). The decisive factor there is found in the Court's statement:

> *"This property was condemned in 1851 and at that time there was no statute in force in this state expressly authorizing a city to take the fee of real estate for street purposes,* and we think the law is clear that before the city could acquire the fee to said real estate for street purposes it must appear that there was a statute in force which by its terms or by necessary implication, authorized the city to take said property in fee, for the purpose of widening said street" (247 Ill. 197) (Emphasis Ours).

Here, the railroad was expressly authorized to acquire the fee and, in fact, directed to do so if unable to acquire the real estate, or an acceptable interest therein, through a voluntary grant. The fee title is not dependent upon the existence or exercise of an implied right. Consequently, the "strict construction rules", to which Petitioner alludes, are without application.

In *Miller* v. *Commissioners of Lincoln Park,* 278 Ill. 400, 406, 116 N. E. 168, 181 (1917), the Court said:

> "Without discussing the question of the title acquired by condemnation for general park purposes, we do not agree with the contention that the condemnation of lands for the purpose of driveways vests the fee in such lands in the commissioners."

The statute *there* under consideration did not "expressly" define "the estate to be taken" and for that reason the Court applied and followed its opinion in Tacoma.

Illinois Central Railroad Co. v. *City of Chicago,* 135 Ill. 453, 28 N. E. 740 (1891) holds that the municipality did not acquire the Railroad Company's fee through an 1888 condemnation pursuant to "Clause 89 of Section 1, Article 9 of the statute relating to Cities and Villages".

Illinois State Trust Co. v. *St. Louis I. M. & S. Ry. Co.,* 208 Ill. 419, 70 N. E. 357 (1904), involves a 1903 condem-

nation proceedings and holds that a motion to dismiss should have been allowed for the reason that "a foreign corporation cannot exercise power of eminent domain under the Act of 1899" etc.

Superior Oil Co. v. *Harsh,* 39 F. Supp. 467 (7th Cir. 1942) holds that Trustees of a School District organized in 1886 had acquired through adverse possession no more than the limited title obtainable by condemnation under the particular statute involved and that the evidence did not justify any presumption of a lost deed to their asserted fee.

Sears v. *City of Chicago,* 247 Ill. 204, 93 N. E. 158 (1910) holds that, for non-compliance with "the 1833 Law", there had been but a common law dedication of the particular streets; that the abutting lot owners therefore "took the fee to the center of the streets"; and that "the 1843 curative Act" did not sustain the City's asserted fee because "The Title of the abutting owners who purchased" "prior to the passage of the Act of 1843" "had become vested to the center of the streets" and to give the contended effect "would be to deprive such abutting owners of their property without due process of law."

In *Illinois Trust and Savings Bank* v. *Chicago,* 247 Ill. 264, 266; 93 N. E. 167 (1910), it is said: "The principles involved in this case are fully discussed in the opinions filed in the cases of *Sears* v. *City of Chicago* (1910), *supra,* and *Tacoma Safety Deposit Co.* v. *City of Chicago* (1910) (*ante* p. 192.)"

Wisconsin Screw Co. v. *Firemans Fund Insurance Co.,* 297 F. 2d 697 (7th Cir. 1962) and *Shackleton* v. *Food Machinery & Chemical Corp.,* 279 F. 2d 919 (7th Cir. 1962) are cited for the proposition that "The District Court's considered view as to the law of the state in which it sits

is entitled to great weight and will be accepted on review unless shown to be clearly wrong". The District Court issued no opinion but simply adopted the findings, conclusions and decree submitted by counsel for Appellee—without change of word or explanation. Furthermore, "the law of the State" as so represented and adopted *is* "shown to be clearly wrong".

These cited cases have nothing to do with the Illinois Statutes or early railroad condemnation proceedings here under consideration.

It is inconceivable that Petitioner's counsel can urge the application of such cases and then argue that "The cases relied upon by Respondents do not hold what they contend and have no application".

Petitioner concedes the Illinois Supreme Court statements that a railroad condemning under the 1852 statute thereby acquired a fee simple title to the lands condemned but asserts that they "are obiter dicta and not controlling authority for the case at bar".

A fair and comprehensive reading of these cases impels a conclusion that the language is not obiter dicta or subject to classification as an unnecessary statement of the opinion author rather than the considered decision of the Court. Otherwise, the Illinois Supreme Court would not have specifically said in *Keen* v. *C. C. C. & St. L. Ry. Co.*, 392 Il. 362, 374 (1945) that:

> "The eminent domain act of June 22, 1852, referred to in Section 4 of the Special Act creating the Cairo & Vincennes Railroad Company, was construed by this Court in *Bartlow* v. *Chicago, Burlington & Quincy Railroad Co.*, 243 Ill. 332 (1910). *It was there held that in eminent domain proceedings under said Act, the railroad company condemning the land acquired*

> *fee simple title to the land condemned.* The rights in and the power to take real estate by condemnation, contemplated by the eminent domain act referred to in Section 4, was the right to take and acquire fee simple title". (emphasis ours)

This quotation removes any reasonable question as to the intents, purposes and true character of the court's pronouncement in such respect. As stated in *Scovill Manf. Co.* v. *Cassidy,* 275 Ill. 462, 470 (1916), *"we do not think the rule laid down * * * was dictum, but even if it was, it was the expression of opinion upon a point in a case deliberately passed upon by the court and should be held as judicial dictum rather than mere obiter. (Law* v. *Grommes,* 158 Ill. 492; *Rhoads* v. *Chicago and Alton Railroad Co.,* 227 id. 328)".

B. There is no proof of title loss through adverse possession.

The District Court, in addition to ruling that no fee ownership was acquired by the condemnations, ruled that Respondents had lost the South 29 feet of the tract through abandonment and adjoining landowners adverse possession.

This ruling was also reversed for want of evidence to prove the charges of abandonment and adverse possession as required by Illinois Law.

It is now argued that the Court of Appeals correctly stated but misapplied the Illinois Law and "completely overlooked important Illinois cases involving directly the question of adverse possession of railroad rights of way in which the facts are almost identical to those in the case at bar and the issues were found against the railroad. *Donohue* v. *I. C. R. R.,* 165 Ill. 640, 46 N. E. 714 (1897); *I. C. R. R.* v. *Houghton,* 126 Ill. 233, 18 N. E. 301

(1886); *I. C. R. R.* v. *O'Connor,* 154 Ill. 550, 39 N.E. 563 (1895)".

In each of these cases, said to have been overlooked, the adverse possession was clearly established. *Here,* there is no evidence to support the District Court's finding. Particularly is this true in light of the presumption favoring a legal title. *Superior Oil Company* v. *Harsh,* Fed Supp. 467, Aff'd 126 Fed. 2d 572 (7th Cir. 1942); *White* v. *Harris,* 69 N. E. 519, 206 Ill. 584 (1904); *Towle* v. *Quante,* 92 N. E. 967, 246 Ill. 568, 574 (1910); the clear and convincing evidence required to defeat a legal title by statute of limitations. *Chicago & Northwestern Ry. Co.* v. *Kennedy,* 176 N.E. 267, 344 Ill. 309, 317-318 (1931); *Duck Island Hunting etc.* v. *Whitnah,* 137 N.E. 840, 306 Ill. 284, 289-292 (1923); *Illinois Central R. R. Co.* v. *Hasenwinkle,* 83 N. E. 815, 232 Ill. 224 229-230 (1908) and the rule that possession which is not hostile or adverse cannot ripen into title however long it continues. *Siegle* v. *Criss,* 144 N.E. 307, 312 Ill. 617, 624 (1924); *Purtle* v. *Bell,* 80 N.E. 350, 225 Ill. 523, 528 (1907); *Mitchell* v. *I. C. R. R. Co.* 51 N. E. 2d 271, 384 Ill. 258, 270 (1943), including the rule that permissive possession or use of land to which another holds the legal title cannot be the basis of a claim to title by adverse possession. *Nitterauer* v. *Pulley,* 82 N. E. 2d 643, 401 Ill. 494, 503 (1948); *I. C. R. R. Co.* v. *Noyes,* 96 N. E. 830, 252 Ill. 178, 182 (1911); *Busch* v. *Huston,* 75 Ill. 343, 347 (1874); *Jones* v. *Scott,* 145 N. E. 378, 314 Ill. 118, 122-123 (1924); *Hankey* v. *Van Scyoc,* 338 Ill. 533, 536 (1930).

It is significant that Petitioner fails to specify any supporting evidence or undertake to explain away the testimony of its own witnesses that the now deteriorated fencing was to keep livestock off the track and protect them against death or injury by train (Dft-Ap't. C. A.

App. 115, 117, 124-125, 131-134); that most of the 29 foot strip was dotted with trees and overgrown with brush (Dft-Ap't. C.A. App. 91); and that the trees and brush covered area had never been cultivated (Dft-Ap't. C.A. App. 91).

CONCLUSION.

The Petition for Writ of Certiorari fails to demonstrate any valid reason for a further review of this case. We therefore urge that the Petition should be denied.

Respectfully submitted,

JOHN P. WHAM
212 East Broadway
Centralia, Illinois

FREDERICK E. MERRITT
220 West Main Street
Salem, Illinois

MAURICE E. GOSNELL
Room 1, Gee Building
Lawrenceville, Illinois
Attorneys for Respondents.

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No. 205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

MARATHON OIL COMPANY, A CORPORATION,
Petitioner,

v.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit.

REPLY MEMORANDUM OF PETITIONER

CRAIG VAN METER
JOHN H. ARMSTRONG
1807 Broadway Ave.
Mattoon, Illinois 61938

JOSEPH F. DIVER
Marathon Oil Company Bldg.
539 South Main Street
Findlay, Ohio 45840
Attorneys for Petitioner

CLAYTON L. ORN
RILEY B. FELL
of Counsel

McCORMICK & HENDERSON, INC., CHICAGO

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I.

One of the basic tenets of respondents' argument is that the condemnation proceedings reflect an intention on the part of the railroad to take a fee.[1] The district court, on

[1] Respondents' brief (p. 6) states: "The condemnation proceedings here under consideration reflect a clear intent to take and a taking of the fee, and all lesser estates. Certainly, there is no language which can logically overcome the legal presumption to that effect."

whom rested the responsibility of construing the condemnation proceedings, held that they reflected an intent to take only an easement (Finding of Fact No. 7—App. 13, Conclusion of Law No. 3—App. 18, Decree—App. 24-25). Even the petitions filed by the railroad in the 1853 condemnation proceedings clearly manifested the intent to take only a right of way—that is an easement—because the nature of the property being taken is described several times as a right of way, roadway, or as being necessary for tracks, and in a table under the column headed "Material Etc. Wanted" the term "Right of way" was inserted (S. App.—C.A. 18-19, 30).

On this subject of the construction of the condemnation proceedings the court of appeals merely said that they reflected an intention "to take an interest in the lands condemned commensurate with the power granted by its charter." 358 F.2d at 36. (App. 4-5). But under its charter the railroad was not required to take a fee—it could take an easement or any of various other types of estates and interests.[2]

Moreover, as the court of appeals held, the condemnation proceedings were brought under the 1852 Act, and under that Act, as it was construed by the district court, the railroad could not take a fee. But assuming arguendo it could take a fee, it clearly could also take an estate less

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[2] See Section 4 of its legislative charter wherein it was provided the railroad could acquire, by both voluntary grants and eminent domain, lands and "any and all interests and estates therein . . . in fee, or otherwise." (App. 38)

than a fee, *viz.* an easement, and that is what the district court held it intended to take as the court construed the proceedings.

As a second major proposition respondents argue that under the 1852 Act the railroad had to condemn a fee and could not condemn a lesser estate.[3] In fact this proposition seems to form the basis of their construction of the condemnation proceedings as evidencing an intention by the railroad to take a fee and not an easement. In this construction of the 1852 Act, they are clearly wrong for reasons which we have shown in our petition. Not only is this compulsion aspect lacking but there cannot even be found in the 1852 Act a grant of any power to take a fee for right of way or trackage or any language from which such power can necessarily be implied. Respondents' brief contains nothing to impinge the decision of the district court or to refute the Illinois law as reviewed in our petition. Respondents are unable to cite any Illinois case holding that a fee was taken by condemnation under the 1852 Act or under any other Illinois statute similar to that Act.

II.

The provision of the 1870 Illinois constitution injected into respondents' argument has nothing to do with this case. The district court did not base its decision upon that section of the constitution or upon any case which turned on the provisions of the section. None of the cases cited by petitioner were decided on the basis of that constitutional provision.

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[3] Respondents' brief (p. 8) states: "Here, the railroad was expressly authorized to acquire the fee and, in fact, directed to do so if unable to acquire the real estate, or an acceptable interest therein, through a voluntary grant."

III.

If respondents mean by their statement on page 10 of their brief that we merely concede that the passages quoted on pages 2-3 of their brief from the *Bartlow* and *Keen* cases[4] appear in the official reports of those cases, they are correct. We do not concede that they are pronouncements by the Illinois Supreme Court of controlling principles of law because the *obiter dicta* in the two cases is so completely at variance with the established Illinois law that it has no value as precedent.

Respondents try to disparage what they call "deed construction cases" cited by petitioner but extol the quoted dictum from *Keen,* a "deed construction case", which in turn merely relied upon earlier dictum in *Bartlow.*

IV.

The necessity and propriety for granting certiorari in this case is as compelling as that which existed in *Carter Oil Co.* v. *Welker,* 24 F.Supp. 753 (E.D. Ill. 1938), aff. 112 F.2d 299 (7th Cir. 1940), cert. gr. 311 U.S. 633 (1940), rev. 317 U.S. 592 (1942). For other precedent see also *Magnolia Petroleum Co.* v. *Thompson,* 106 F.2d 217 (8th Cir.

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[4] *Bartlow* v. *C. B. & Q. R.R.,* 243 Ill. 332, 90 N.E. 721 (1909); *Keen* v. *C. C. & St. L. Ry.,* 392 Ill. 362, 64 N.E.2d 499 (1945).

1939), cert. den. and reh. gr. 308 U.S. 613 (1939), order vacated and cert. gr. 308 U.S. 630, rev'g ct. of app. and aff'g distr. ct. in part and remanding 309 U.S. 478 (1940).

Respectfully submitted,

CRAIG VAN METER
JOHN H. ARMSTRONG
1807 Broadway Ave.
Mattoon, Illinois 61938

JOSEPH F. DIVER
Marathon Oil Company Bldg.
539 S. Main St.
Findlay, Ohio 45840
Attorneys for Petitioner

CLAYTON L. ORN
RILEY B. FELL
of Counsel

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CRAIG VAN METER
JOHN H. ARMSTRONG
1807 Broadway Ave.
Mattoon, Illinois 61938

JOSEPH F. DIVER
Marathon Oil Company Bldg.
539 South Main Street
Findlay, Ohio 45840
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Petitioner, Marathon Oil Company, respectfully petitions this Court for a rehearing of the Court's denial on October 10, 1966, of the petition for a writ of certiorari filed by petitioner. Petitioner files this petition for rehearing pursuant to Rule 58 of this Court and presents, as hereinafter stated, other substantial grounds for granting the petition for writ of certiorari available to petitioner although not previously presented.

In this action the owners of the land contiguous to the railroad right of way which is involved in the dispute own

the oil and gas under the right of way provided the railroad did not acquire title to it by virtue of the 1853 condemnation proceedings. Those landowners are also the lessors of plaintiff or the successors of such lessors and are commonly referred to as royalty owners. Such landowner-lessors were not joined as parties to this suit because they are not indispensable parties. *Texas Co.* v. *Wall,* 107 F.2d 45, 49-50 (7th Cir. 1939). Here, as in *Texas Co.* v. *Wall,* the plaintiff, as an oil and gas lessee, is seeking to enjoin a defendant, also as an oil and gas lessee, from interfering with the plaintiff's leasehold interest; no relief is sought either for or against the landowner-lessors; and the judgments of the Courts below did not give any relief against them. See *Texas Co.* v. *Wall,* 107 F.2d at p. 50.

Since they are not parties to this action, the landowner-lessors are not bound by the judgment of the Court of Appeals. They are free to assert their claims to the oil and gas under the right of way either as plaintiffs or defendants in suits brought to try title to the right of way or suits for accounting for the oil and gas produced from it. In any additional litigation of such nature between petitioner and respondents, which undoubtedly will follow the termination of this action, the landowner-lessors would have to be brought in as parties because their interests would be seriously affected by legal actions of that nature.[1]

The additional litigation thus involving the landowner-lessors would have to be prosecuted in the Illinois State

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[1] In *Texas Co.* v. *Wall,* 107 F.2d 45, 49-50 (7th Cir. 1939) it was recognized that in certain types of cases the lessors of a plaintiff-lessee are indispensable parties. See also *South Penn Oil Co.* v. *Miller,* 175 F. 729 (4th Cir. 1909), and *McConnell* v. *Dennis,* 153 F. 547 (8th Cir. 1907).

courts because the requisite diversity of citizenship for invoking the federal courts' jurisdiction would be lacking. That would not only generate a multiplicity of suits and needless protracted litigation but could, and very likely would, result in a judgment or judgments in the Illinois courts, including the Supreme Court of that state, contrary to the judgment of the Court of Appeals in this case.

In a similar situation this Court took cognizance of a possible conflict between decisions of the Illinois and the federal courts regarding the nature of the title acquired by a railroad in its right of way and used that as a basis for reversing a court of appeals decision. *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940). The procedure followed in *Thompson* v. *Magnolia Petroleum Co.* is appropriate and required in this case provided that this Court upon a full hearing, after granting certiorari, deems the Illinois law not sufficiently clear to affirm the District Court's judgment. Under such circumstances this Court should grant this petition for rehearing, grant certiorari, reverse the judgment of the Court of Appeals, reverse the judgment of the District Court and remand the cause to the District Court "with instructions to modify the order so as to provide appropriate submission of the question of fee-simple ownership of the right of way to the Illinois State courts". See *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 484 (1940):

For reasons which we have shown in our petition for writ of certiorari, the judgment of the Court of Appeals is wrong and that of the District Court is correct. This Court should grant certiorari and after a review of the judgment of the Court of Appeals, reverse that judgment, but if the Court is not convinced of the necessity and propriety of such action, it is submitted that the most that can be said in justi-

fication for not taking such action is that there are no Illinois cases construing the nature of the title or quantum of estate taken by condemnation under the Illinois 1852 statute. That would put the case in the same posture as *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940),[2] and what the court said there is applicable here, that is: "*Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable.* And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. *Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme.*" 309 U.S. at 484 (emphasis supplied).

WHEREFORE petitioner, Marathon Oil Company, prays (1) that this petition for rehearing be granted, (2) that the denial on October 10, 1966, of the petition for writ of certiorari be vacated, (3) that the petition for writ of certiorari filed herein by petitioner be granted and (4) that upon argument and consideration of the issues herein, the judgment of the Court of Appeals be reversed and the judgment of the District Court affirmed, or in the alternative that the judgment of the Court of Appeals be reversed, the judgment of the District Court be reversed and the cause remanded to the District Court with instructions to enter such orders

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[2] The history of this case in the federal courts is as follows: *Magnolia Petroleum Co.* v. *Thompson*, 106 F.2d 217 (8th Cir. 1939); cert den *Thompson* v. *Magnolia Petroleum Co.*, 308 U.S. 613 (1939), reh gr 308 U.S. 630 (1939), rev 309 U.S. 478 (1940).

and take such action as is necessary to provide appropriate submission to the Illinois State courts of the question of the nature of the title acquired by the railroad by condemnation under the Illinois Act of 1852.

Respectfully submitted,

Craig Van Meter

CRAIG VAN METER
JOHN H. ARMSTRONG
1807 Broadway Ave.
Mattoon, Illinois 61938

JOSEPH F. DIVER
Marathon Oil Company Bldg.
539 South Main Street
Findlay, Ohio 45840
Attorneys for Petitioner

CLAYTON L. ORN
RILEY B. FELL
of Counsel

CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner, Marathon Oil Company, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and the petition presents other substantial grounds available to petitioner although not previously presented, and said petition is restricted to the grounds above specified.

Craig Van Meter

CRAIG VAN METER
1807 Broadway Avenue
Mattoon, Illinois 61938